# United States Supreme Court

October Term, 19[illegible]

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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In The

# United States Supreme Court

October Term, 1960

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No.

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MARY G. ROEBLING,

Petitioner;

v.

C. DOUGLAS DILLON, SECRETARY OF THE TREASURY,
(Substituted for Reconstruction Finance Corporation),

Respondent.

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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**To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:**

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled case on February 9, 1961.

## OPINIONS BELOW

The opinion of the Court of Appeals (___ U.S. App. D.C ___, ___ F.2d ___) has not yet been reported. The United States District Court for the District of Columbia signed findings of fact and conclusions of law but issued no separate opinion.

## JURISDICTION

The opinion of the Court of Appeals was handed down February 9, 1961. A motion to stay the issuance of the opinion and certified copy of the judgment of this Court was filed February 23, 1961 and granted March 6, 1961. The jurisdiction of this Court rests on 28 U.S.C. 1254(1). See also Rule 21 of the Rules of this Court and Rule 41(b) of the Federal Rules of Civil Procedure.

## QUESTIONS PRESENTED

The questions for which certiorari is sought are:

1. Whether the Court of Appeals properly and appropriately exercises its function of supervising the District Court when it fails to reverse a judgment of dismissal at the close of plaintiff's case, which was made with inadequate and erroneous findings directly contradictory of record evidence, which were prepared by counsel for the prevailing party, and adopted in toto (to the extent of failing to correct even typographical errors) and without any apparent consideration by the District Court.

2. Whether a United States District Court abuses the sound discretion afforded it under Rule 41(b) of the Federal Rules of Civil Procedure in ruling on a motion to dismiss at the close of plaintiff's case, to determine the facts and render a judgment against plaintiff, or to decline to render any judgment until the close of all the evidence, when it dismisses a complaint on the basis of a record containing positive, uncontradicted and unimpeached evidence, all of which is inherently probable and supports the plaintiff's claims, and when it adopts findings of fact and conclusions of law prepared by counsel for the defendant which are

inadequate, erroneous and directly contradictory of the record evidence, and renders judgment against the plaintiff.

3. Whether a United States District Court can adopt without any apparent consideration, general findings of fact and conclusions of law under Rule 41(b) prepared by counsel for the prevailing party as a basis for a judgment of dismissal at the close of plaintiff's case, and which are in direct conflict with all testimonial and documentary evidence adduced at the trial in support of plaintiff, and which make no findings as to specific facts, credibility or any other factor which might have served as a basis for the conclusions of fact and law adopted.

4. Whether controlling, positive and uncontradicted evidence, (a) unimpeached by cross-examination or otherwise and supported by documentary evidence taken from the files of the opposing party, (b) not inherently improbable and (c) where no circumstances reflected on the record cast doubt on its verity, may be disregarded by a Federal District Court sitting in a civil action without a jury.

## STATUTES AND FEDERAL RULES INVOLVED

The pertinent Statute and Federal Rules of Civil Procedure are printed in Appendix D, infra.

## STATEMENT OF THE CASE

**Procedural Background**

This case has been twice appealed to the United States Court of Appeals for the District of Columbia Circuit. The first trial was held before Federal District Court Judge Alexander Holtzoff, who dismissed the four counts of petitioner's claim on March 4, 1957, without making findings of fact on any of the counts or conclusions of law on three of the counts. Petitioner appealed to the Court of Appeals, on these grounds, among others, together with the further ground that RFC had denied petitioner adequate discovery. The Court of Appeals reversed the trial court, holding that petitioner had been prejudiced in the preparation of her case by the refusal of RFC to allow discovery. In its opinion that Court stated[1] that the trial court's failure to make formal findings could be supplied on remand.

The second trial was held before Judge F. Dickinson Letts during the period from December 4, 1959, through December 18, 1959. At the conclusion of petitioner's case, RFC moved to dismiss. The trial judge thereupon granted the motion, stating that he was not going to give his reasons[2] therefor, and requesting counsel for respondent to prepare formal findings of fact and conclusions of law. Findings of fact and conclusions of law,[3] which contradicted the record evidence, were prepared by counsel for respondent and adopted in toto by the trial court (without hearing, comment or change, including three typographical errors).

Petitioner again appealed to the United States Court of Appeals for the District of Columbia Circuit. Oral argument thereon was had on October 28, 1960, and the Court issued its 4-page decision[4] on February 9, 1961.

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[1] Reprinted as Appendix A to this Petition.

[2] "JUDGE LETTS: Gentlemen upon the record the Court finds that the plaintiff has failed to make out a prima facie case upon any of her claims. Now I will not attempt orally to state the reasons or the basis of my opinion They will appear in my findings of fact. I ask Mr. Espey to prepare and submit for settlement findings of fact, conclusions of law and judgment form dismissing the complaint upon the motion." (JA 375)

[3] Reprinted as Appendix B hereto.

[4] Reprinted as Appendix C hereto.

Petitioner's amended complaint contained counts alleging (1) a breach of an express oral contract, (2) a breach of an implied-in-fact contract and (3) a right to recover in quasi-contract. T. Girard Wharton, Esquire, a leading member of the New Jersey bar, represented petitioner throughout the negotiations and settlement with RFC, which gave rise to the alleged contract. The evidence at trial consisted mainly of Mr. Wharton's testimony, that of Mr. Matlack (whose interest during the period in question was adverse to petitioner) and documents relating to the transaction taken from the files of respondent, RFC.

Mr. Wharton was extensively cross-examined for two entire days by respondent's counsel. His testimony was positive, candid, and not impeached in any respect by cross-examination or otherwise. It was supported by the testimony of Mr. Matlack and by documents taken from respondent's own files. It was not inherently improbable and no circumstances reflected on the record cast doubt on its verity.

Despite all of this, (a) the Court on the first trial made no findings of fact, and (b) at the termination of the petitioner's case on the second trial, respondent's counsel prepared findings of fact and conclusions of law based solely on allegations set forth in his opening and closing arguments to the Court. These were adopted in toto and without change by the trial court. The undisputed facts established on the petitioner's case were as follows:

**First $2,000,000 Loan**

Trenton Trust Company, a banking corporation at Trenton, New Jersey (herein referred to as the Bank), in order to qualify for insurance by Federal Deposit Insurance Company on January 1, 1934, required $4,000,000 additional capital funds. As a part of President Roosevelt's recovery program, the respondent[5] agreed to loan to Trentrusco Corporation (herein referred to as Trentrusco), a subsidiary of the Bank, the sum of $2,000,000 for which Trentrusco gave its note to respondent and purchased with the proceeds $2,000,000 of preferred stock A of the Bank, which stock

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[5] The Secretary of the Treasury has been substituted for RFC in view of its liquidation. The term respondent as used refers to the RFC in each instance.

was immediately assigned to respondent as security for the payment of such note (JA 73-74; 95-A-1).[6]

At the same time, to furnish a substantial part of the $2,000,000 additional capital required by RFC to enable the Bank to qualify for insurance, Siegfried Roebling, petitioner's husband and then a director (but not an officer) of the Bank, voluntarily purchased 18,700 shares of preferred stock B of the Bank at $1,870,000. Most of the balance of such issue was purchased by the five other directors referred to below.[7] (JA 73-74).

**Personal Notes of Directors**

During 1933, to strengthen the Bank's weakened cash position, these six directors had given their personal notes aggregating approximately $585,000 to the Bank, which notes were then discounted and the proceeds used by the Bank to bolster its cash position. In 1933, Siegfried Roebling gave his note for $200,000 and secured its payment with collateral. The other five directors gave their notes in the following amounts: Bedford, $100,000; Cartlidge, approximately $100,000; Chamberlain, $50,000; Conner, $35,000; and Voorhees, $100,000. At the same time, certain slow but good assets in approximately the same total amount were taken from the Bank's portfolio and trusteed for the benefit of the notemakers, it being intended that the proceeds from these slow assets were to be used to pay the notes of the six directors (95-A-1; JA 73-74).

RFC required as a condition precedent to the loan of $2,000,000 to Trentrusco in 1934, that in addition to the preferred stock A of the Bank, collateral approximating $500,000 be made available to secure the loan. To make this possible the notemakers consented to the transfer of that amount of the trusteed assets to Trentrusco in exchange for

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[6] All numbered references preceded by a "JA" refer to the Joint Appendix, and those to exhibits are not preceded by any letter (although there are several exhibits in which a letter follows the exhibit number, such as 95-A-1 and 62-A-1), since they are referred to more often.

[7] Directors Bedford, Cartlidge, Chamberlain, Conner and Voorhees (a total of 950 shares at $95,000), and other private sources (a total of 350 shares at $35,000).

an equivalent amount of stock of that corporation and to the immediate pledging of such assets with respondent.

On January 1, 1936, Siegfried Roebling died. Pursuant to a court order of June 22, 1937, petitioner succeeded to his right in his portion of the trusteed assets, most of which were pledged with RFC as indicated above (95-A-1; JA 73-74).

**Second $2,000,000 Loan and Dispute over Directors' Notes**

In September 1936, an additional loan of $2,000,000 by way of purchase of an additional 100,000 shares of said preferred stock A was made to the Bank by RFC. At that time, to assist the Bank further, the Roebling Estate, with court approval, subordinated its preferred stock B of the Bank to this additional $2,000,000 issue of preferred stock A. After the negotiation of this second loan, a dispute arose between the Bank and RFC, on the one hand, and certain of the notemakers on the other, as to whether the notemakers were primarily liable on these personal notes. Four of the six notemakers contended that their notes were for the accommodation of the Bank and that they were liable only insofar as the assets (most of which were first trusteed for them and later pledged with RFC at its insistence) did not satisfy the amounts due on the notes (95-A-1; JA 75-76).

From December 1936 until February 1940, the management of the Bank unsuccessfully attempted to induce these notemakers (or the estates of deceased notemakers) to recognize their notes as primary obligations and to place them in bankable condition. On several occasions during this period, the RFC Board authorized its officials to enter into an agreement with the surviving notemakers (including petitioner)[8] providing for the release to them of preferred stock A pledged with RFC if the notemakers would recognize their notes as primary obligations and place them in bankable condition. During 1938 and 1939, negotiations were

[8] For convenience, petitioner and the other five directors are frequently referred to as "Mrs. Roebling and the other notemakers." In correspondence the RFC frequently used this phrase in the same reference.

had between RFC and the notemakers or their estates, looking toward such a settlement. RFC had control of the Bank through its power to vote the preferred stock A and it postponed the annual meeting of the stockholders on several occasions in these years to work out such a settlement (95-A-1; JA 78-80, 198, 199).

**RFC's Offer to Release Stock to Notemakers**

Specifically, in January 1938, the RFC Board offered to release to the notemakers $367,000 aggregate retirement value of preferred stock A of the Bank,[9] if the notemakers would place their notes in bankable condition. This was part of an over-all settlement which provided that Mrs. Roebling was then to become the sole stockholder of Trentrusco and hence entitled to the balance of the stock and assets belonging to Trentrusco. This offer was never rescinded prior to the agreement between Mr. Wharton, attorney for petitioner and the Roebling Estate, and Verner C. Boggs, a representative of the respondent, on or about May 20, 1940 (62-A-1, 62-A-2).

The release of stock to the notemakers was again discussed by the RFC Board on January 18, 1939. The Board decided that even if it were impossible to reach an agreement with the executors of the Voorhees Estate (Voorhees having died on July 29, 1938), RFC would nevertheless be willing to release stock to certain of the other notemakers, and it directed its Assistant General Counsel, C. J. Durr (who was charged with resolving this problem), to write the attorney for some of the notemakers to that effect. At that time, in January 1939, it was not contemplated that petitioner would share in the preferred stock A of the Bank then to be released. She was to release her interest in the shares which were to be released to the other notemakers. In return, they were to release their interest in Trentrusco Corporation so that Mrs. Roebling, through acquiring complete ownership of Trentrusco, would acquire the entire equity in the uncollected pledged assets (62-A-1, 62-A-2).

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[9] 18,350 shares of the par value of $6 per share and retirement value of $20 per share.

On October 4, 1939, RFC instructed its Philadelphia Office to inform the notemakers that the offer to release shares to them would be withdrawn and suit would be commenced against them unless the notemakers' problems were resolved within 60 days. On November 8, 1939, E. Raymond Scott, RFC's Philadelphia Agency Manager, inquired of Durr whether the RFC's 1938 offer to release shares of preferred stock A was still open. On November 24, 1939, Scott inquired again. Durr told Scott that the attitude of the RFC Board had not changed and that the 1938 offer to release stock remained open. On December 5, 1939, RFC's Washington Office requested Scott in Philadelphia (in a letter dictated by Durr)[10] to inform the notemakers that the offer to release shares to them would be withdrawn, suit against them would be commenced, and Agency counsel would be instructed to foreclose unless adjustment of the notemakers' problem were reached by December 6, 1939. However, RFC's offer to release shares was never withdrawn (63, 63-A 1, 63-A-2, 64).

Walton, Acting Manager of the Philadelphia Agency, so informed the Roebling Estate on December 7, 1939. On December 11, Durr wrote Scott in Philadelphia that Wharton had telephoned that the notemakers were to confer on December 14 and requested that no action be taken on the foreclosure until after the meeting. Durr told Scott that he did not object to withholding foreclosure for a week and to so advise the parties (65, 67, 67-A-1, 67-A-2).

On December 15 (a day after the notemakers' meeting), Durr placed a typed memo, containing one paragraph in his handwriting[11] in the RFC files, the title of which was, "Suggested Method of Settling with Trenton Trust Company

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[10] Mrs. Madge Warner Tallman, one of Durr's two secretaries during the period January 1, 1938 to January 1, 1941, testified that she and Miss Catherine McIntyre handled almost all of Durr's secretarial work during this period. Durr was Assistant General Counsel of RFC in Charge of Preferred Stock Section. She identified Durr's initials, Miss McIntyre's and her own (then "M.W.") on many of petitioner's exhibits (64, 70, 72, 82, 62-A-1, JA 354-357).

[11] Respondent stipulated that if Durr were called he would testify that this note and initials were in his handwriting.

Notemakers." The handwritten note initialed by Durr stated that, "This was discussed informally with the Directors on 12/15/39 and they agreed in principle but no understanding was reached as to the date from which interest should accrue. C.J.D."

The suggested method of settlement provided that (1) RFC was to foreclose the loan, bidding for all the preferred stock and other pledged assets the balance due on the loan plus interest and expenses; (2) upon possession of the assets, RFC was to tender to each notemaker, other than the Roebling Estate, preferred stock equal to the balance due on his note, if his note were placed in bankable condition and the tendered stock pledged as additional security therefor; (3) the remaining preferred stock and other assets were to be sold to Mrs. Roebling for the balance due on the loan plus interest and expenses (68-A-1).

Mrs. Roebling was to give her note in payment to be secured by the remaining preferred stock and other assets. Consideration was to be given to accepting her non-liability note which "for all practical purposes, place[s] the loan in substantially the same condition as the present loan to Trentrusco" (as Trentrusco had no assets other than the pledged collateral); and (4) the notemakers' notes, other than Roebling's, were to bear interest at the dividend rate on the preferred stock, which was to run from the date of tender to them of such stock. As stated above, this had been discussed with the RFC Board which had agreed in principle (68-A-1).

No agreement having been reached, on December 19, 1939, RFC instructed Philadelphia to proceed with foreclosure and not to bid in excess of the balance due on the loan, including interest and expenses. Upon completion of the foreclosure and reduction of the pledged collateral to possession — "with the elimination of the legal problems which have prevented the notemakers from reaching a satisfactory agreement among themselves as to the proposals heretofore offered" by RFC — RFC would be in a position to deal individually with the notemakers. "Some arrangement on substantially the same basis" as heretofore offered by RFC was to be worked out. RFC indicated that in working out any such arrangement, it was expected that the expenses

of foreclosure would be taken care of by the notemakers (69, 70; JA 200-201).

As indicated above, in the meantime Notemaker Voorhees had died on July 29, 1938. His estate refused to participate in the negotiations. Therefore the Bank, on June 6, 1939, sued his estate. While the remaining notemakers seemed to be near agreement with the Bank and RFC in the Fall of 1939, settlement seemed impossible because of the unwillingness of the Voorhees Estate to participate in any settlement (95-A-1; JA 198-199).

**Foreclosure and Renewal of RFC Offer**

As a result and to make it possible for respondent to deal with the notemakers, other than the Voorhees Estate, on February 23, 1940, RFC foreclosed on the pledged assets, including the shares of preferred stock A, all of which are listed on Appendix A to the Amended Complaint. Thereafter, on this same day, when Scott informed Durr by telephone that the foreclosure had taken place, Durr instructed him to contact Eugene Fountain (Executive Vice President of the Bank) and tell him to inform all notemakers that RFC was now ready to deal with them. Durr informed Scott that the Agency would probably not be required to service the collateral as tentative arrangements had been made for petitioner to take over the assets and repledge them with RFC (69, 70, 71, 71-A-1).[12]

Immediately thereafter, on March 13, 1940, Scott wrote to Mathew J. McGrath, Chief of respondent's Examining Division, that in a telephone conversation on February 23, 1940, Scott was informed that the Agency probably would not be required to service the acquired assets — as "tentative arrangements had been made for Mrs. Roebling to take over the assets and repledge them with us as collateral to a note which she was to execute" (71-A-1).

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[12] After the foreclosure Durr discussed with Wharton petitioner's willingness to take over all the stock and assets for her non-liability note. Although Wharton explained to her that she would assume no personal liability in such a case, she was apprehensive about giving a note in such a large amount, fearing that if anything went wrong, it might affect her very seriously financially (JA 203-204).

Thereafter, on March 15, 1940, McGrath signed and forwarded a letter to Scott (dictated by Durr) and on March 20, 1940, Scott, in turn, wrote Fountain offering to release shares of preferred stock A to all of the notemakers or their estates (except the Roebling estate) who would recognize their notes and place them in bankable condition (72, 73).[13] The Roebling Estate was excepted at that time (as it had been in every other offer by RFC) as the release of any preferred stock A or other assets to Mrs. Roebling (or the Roebling Estate) was to abide the repayment to RFC of the first $2,000,000 loan. However, as part of the proposed settlement embodied in McGrath's letter of March 15, 1940, RFC requested that each notemaker (including the petitioner) pay to it his pro rata share of the expenses of foreclosure. Petitioner transmitted payment of such expense on April 19, 1940.[14]

Meanwhile, on March 18, 1940, Scott had telephoned McGrath to ascertain the setup in connection with the Roebling Estate and the adjustment of the Trentrusco matter. McGrath was not familiar with the details, promised to talk with Durr about it and advise Scott. Scott wrote Fountain on March 25, 1940, that when any of the proposals of the notemakers were submitted they were to be accompanied by a statement from the bank recommending the acceptance or rejection of each offer. Accordingly, on April 12, 1940, Fountain wrote Scott concerning further developments of the notemakers and stating that Wharton, attorney for the Roeblings, had stated to Fountain, that "the indebtedness would be paid just as soon as the others interested in this Directors' note matter came forward and worked out a deal that is satisfactory" (72-A-1; 74, 77, 79-D).

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[13] This letter of March 20 was found in the minutes of the Bank's Directors meeting of March 21, 1940.

[14] In this connection, Durr, in a memo of February 23, 1940, to McGrath and Griffin, made this significant statement, "I further asked that he [Scott] get up a statement of all expenses in connection with the foreclosure sale so that we can make a prompt proration among the notemakers and require each one to pay his pro rata part before any preferred stock is released to him."

Fountain reported to Scott again on April 19, 1940, that

> "* * * The question has been raised by Mr. Wharton if the preferred stock A when released by your corporation, could be given to Mrs. Mary G. Roebling instead of the Estate. Our General Counsel has looked into the matter with our Trust Officer and the writer, and it would appear that inasmuch as the Estate is paying off the indebtedness the stock to be released should come directly to the Estate."[15]

Significantly, a copy of this letter as found in the respondent's files contained this marginal notation, in the handwriting of Durr, "No stock goes to Roebling Estate until we have gotten back all of p[referred] s[tock] loan" (79-B).[16]

Meanwhile, on April 3, 1940, the RFC Board authorized a letter to Scott (dictated by Durr), which stated, in part, that all matters relating to the Bank, including the loans of certain directors to the Bank which had been the subject of discussions and correspondence between the Examining Division, Durr and McGrath, and representatives of the Bank and certain attorneys, should continue to be referred to McGrath, Durr or to the Examining Division (75).

**Boggs' Dealings with Bank and Notemakers**

Accordingly, prior to May 13, 1940, Boggs, from the Examining Division, had been sent to Trenton to work out the details of the settlement of the so-called "Directors' Notes" problem. Prior thereto Boggs had been assigned to the Special Service Section in the Chief Examiner's Division in Washington. Wharton testified that during the years 1937 and 1938, he dealt chiefly with Durr and occasionally with

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[15] In each case herein emphasis has been supplied.

[16] Respondent stipulated that if Durr were called to testify, he would testify that this notation was in his handwriting. Both Durr and Fountain, who were intimately involved in these transactions, assumed that the Roeblings would eventually receive stock. Their assumptions are significant as Durr was an authorized agent of RFC, and Fountain had been at odds with Mrs. Roebling for some time (See Ex. 32-A-1, 95-A-3).

Mr. Sam Husbands, then chief of the section. Wharton was first introduced to Boggs when Husbands became a director in 1939 and McGrath took Husbands' position (79-D-1; JA 78-79).

RFC records show that at least as of July 1, 1939, Boggs was handling Trenton Trust Company matters. They also indicate that he was very familiar with Durr's negotiations with the notemakers and the offer to release stock to the notemakers in January of 1938 (95-A-1). This plan[17] called for the payment of the Roebling note and, among other things, the assumption by Mrs. Roebling of all of the obligations of Trentrusco Corporation with the release of stock to the other five notemakers, or their estates, in proportion to the unpaid balances on their notes.

A report by Boggs dated July 1, 1939, contains, in part, the following in this regard (95-A-1):

> "The unsecured notes [personal notes of director-notemakers] were criticized by the bank examiners and inasmuch as this Corporation felt that they should be put in bankable shape, Mr. C. J. Durr, Assistant General Counsel of this Corporation went to Trenton in January 1938, to discuss this matter with the interested parties. It was brought out in this conference that the Roebling Estate was willing to pay its note and the Chamberlain note had been satisfactorily collateraled, but the others refused to recognize the debt. As a result of the conference, it was arranged that the Roebling Estate would pay off its note and assume all liabilities of the Trentrusco Corporation and that this corporation would consider the release to the other five signers, or their estates, from the preferred stock "A" pledged on the loan, an amount of preferred stock equal to the amount of the several unpaid notes as of January, 1938.
> * * *

[17] Had this plan been carried out it would have left petitioner in exactly the same position she would have been had RFC performed its agreement made about May 20, 1940. In other words, after the shares had been released to the five other directors, she would then have received all of the remaining assets of Trentrusco when the first $2,000,000 loan had been paid in full.

"* * * It is now proposed to go through with the plan as originally approved, except that preferred stock "A" will not be offered in the case of the Voorhees Estate. * * *[18]

In a handwritten note at the conclusion of the report, signed, "V. C. Boggs 7-1-39," appears the following:

"Based on plans being effective on 8-1-39 obligors whose notes bank continues to hold will be required to pay interest to bank from that date at 3-1/2%. Any obligor who has paid interest on note from Jan. 1939 to Aug. 1, 1939 is to be credited with that amount on principal of his obligation."

Respondent's records contain detailed reports on the Trenton Trust Company made by Boggs to the Review Committee, among which are those dated January 24, January 25 and April 26, 1940 (92-A-2, 92-A-3, 92-A-4).[19]

The dissident notemakers refused to agree with the RFC's suggested plan of settlement [March 15, 1940], as they were being required not only to place their notes in bankable condition, but also to pledge the released shares of preferred stock A as additional collateral to their notes. This would not reduce principal and interest due on such notes. In fact, "Mr. Bedford advised Mr. Boggs that he would prefer to stand suit rather than pledge collateral and give a financial statement." RFC considered the action it might take as owner of the controlling stock of the Bank to compel the Bank's Board to bring suit against all the notemakers who refused to place their notes in bankable condition. As lawsuits against the as yet unsued dissident notemakers would involve the most prominent families of

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[18] A marginal note obviously in Boggs' handwriting states that "Durr says Bur. of Int. Rev. has decided that Trentrusco is not liable as a person holding co."

[19] It indeed seems odd that Boggs would write such elaborate reports on such minor matters (a $731.20 increase for building and other employees in one instance, 95-A-2), and fail to write any memo whatsoever on the negotiations that he and Scott were having with petitioner and other notemakers. He had written up the entire background of the problem on July 1, 1939. The explanation is that he probably wrote numerous memos on this matter during this period and these are among the papers which repose in the Administrative File which RFC failed to produce.

Trenton, New Jersey, to the prejudice of the Bank and the respondent as principal and controlling stockholder, and in order to achieve an amicable settlement, petitioner offered to aid the other notemakers and RFC by making a market for such preferred stock A by purchasing (at its par value of $6 per share), the shares then to be released by RFC to the notemakers, and to subordinate her position until sufficient equity accrued in the pledged collateral account to justify release to her of shares or other pledged assets. Simultaneously, the other notemakers were to use the proceeds thus realized to reduce the balance due on their respective notes. The shares of preferred stock A then had no market value and their book value was substantially impaired (79-D-1; JA 205-208).

**Agreement Between Petitioner, Respondent and Other Notemakers**

During May and June 1940, Boggs and Scott went to Trenton, New Jersey, and negotiated the details of an agreement with petitioner and four of the notemakers (Bedford, Conner, Cartlidge, and the Estate of Chamberlain) which provided, in part, that they would recognize their notes and place them in bankable condition if petitioner would purchase the 4,766 shares of preferred stock A of the Bank to be released to Bedford, the 1,668 shares to Conner, and the 4,766 shares to Cartlidge. The agreement reached by Wharton (on behalf of petitioner), with RFC and the other parties in interest was set forth in his letter to RFC dated May 20, 1940 (1-B, 79-D-1).

The agreement provided in substance that, in consideration of petitioner's aiding and causing the four notemakers in question to place their notes in bankable condition by purchasing shares of preferred stock A (which had no market value) from three of such notemakers at $6 per share in order to strengthen the collateral securing RFC's first $2,000,000 loan, agents of RFC, who had been representing RFC in its affairs with such Bank since 1936, agreed, in behalf of RFC, to (1) release immediately to the four parties, other than petitioner, pro rata shares of stock of such Bank obtained by RFC by foreclosure; (2) repay the expenses of foreclosure paid by petitioner and the others; and (3) give the Voorhees Estate until May 21, 1940, to recognize its

obligation on Voorhees' note and to pay or otherwise place it in bankable condition. If this were done, and if the Roebling note were paid or otherwise placed in bankable condition, shares of preferred stock A or other assets were to be released to the Voorhees Estate and to petitioner, in the same proportion as the original Voorhees and Roebling notes bore to the whole amount of the several directors' notes, until each received the full amount of preferred stock A or other assets to which each was entitled. If the Voorhees Estate did not so recognize its obligation, then all of the preferred stock A or other assets were to be released to petitioner if and when the balance due upon the $2,000,000 loan justified such release (1-B; JA 80-81, 205-208).

Previously, on May 16, 1940, the Bank's Board of Directors and its Trust Committee (representing the Roebling Estate) adopted resolutions interposing no objections to the releasing (by RFC to petitioner) of preferred stock A of the Bank, if, as and when available, "in accordance with the plan now being consummated with respect to the settlement of obligations of certain directors held by the Trenton Trust Company," provided petitioner indemnified the estate against any possible loss.[20]

On May 17, 1940, the RFC Board of Directors authorized immediate transfer of 4,766 shares each to Bedford and Cartlidge, 1,668 to Conner, and 2,383 to the Chamberlain Estate, on certain conditions as acceptable to Messrs. Boggs and Scott (80-81).

On May 17, 1940, Wharton wrote Boggs in Washington that petitioner had advised him that Boggs was returning to Trenton on Tuesday, May 21. Wharton told him that he could not meet him until between 4 and 5 o'clock at the Bank. On the next day, May 18, Wharton telegraphed Boggs in Washington that petitioner was hospitalized as a result of an auto accident, that he did not know the extent of her injuries but that he was uncertain whether he could have "the checks and other papers signed by her on Tuesday." He was willing to meet Boggs on Tuesday as planned, in any event, to complete arrangements so that the papers might be signed by petitioner

[20] Copies of such resolutions were handed to Boggs by Mr. Whitlock when he was in Trenton on May 28, 1940, and were found in RFC files (JA 321).

as soon as possible. Boggs wired Wharton that he would be in Trenton Tuesday morning, May 21, 1940 (83, 84, 85).

**Release to Bedford, Chamberlain, Cartlidge and Conner**

On May 22, 1940, Messrs. Boggs and Scott were in Trenton to complete the administrative details in regard to the settlement with Notemaker Bedford and the Chamberlain Estate. The shares released to Bedford were simultaneously purchased by petitioner and the proceeds were used immediately to reduce the balance due on his note. On May 23, 1940, Boggs and Scott took similar action in regard to the settlement with Notemaker Cartlidge. Similarly, shares released to him were simultaneously purchased by the petitioner and the proceeds therefrom applied to the balance of his note (2-6, 6-A, 6-B, 7, 8). The Philadelphia Agency wrote to the RFC in Washington on May 25, 1940, stating that, "We understand that when you reply to Mr. Wharton's letter of May 20, 1940, you will send us a copy for the completion of our files" (9).

Notemaker Conner, being out of Trenton on May 22 and 23, 1940, a settlement date with him was arranged for June 4, 1940. On that date Boggs and Scott were present and arranged the details of this settlement. Similarly, shares released to him were then purchased by petitioner and the proceeds used immediately to reduce his note.

**Reaffirmation of May 20th Agreement**

Thereafter, on June 4, 1940, from 8 to 10 p.m., a meeting arranged by RFC was held at the Trenton Banking Company of Trenton, New Jersey (distinguished from the Trenton Trust Company referred to herein as the Bank), attended by Boggs and Scott on behalf of RFC, Fountain on behalf of the Bank, Wharton on behalf of petitioner, and Mrs. Voorhees and Messrs. Matlack, Green and Barber of Trenton Banking Company, executors of the Voorhees Estate, at which a final attempt was made to work out a settlement with the Voorhees Estate (13, 14, 15; JA 295-296).

At this meeting, Boggs stated that $296,000 had been realized on the pledged assets. If the Voorhees note were paid, his estate ultimately would receive approximately

4700 shares of preferred stock A of the Bank held by RFC. Boggs indicated that if his estate would agree to this, RFC would agree to distribute as and when pledged assets were liquidated, shares of preferred stock A or other pledged assets in a ratio of two to petitioner for one to the Voorhees Estate, as Roebling was indebted to the Bank in twice the amount of Voorhees. Boggs made it plain that he was acting in accordance with the authority of RFC's Board and he did not state that any settlement would be subject to the further approval of that Board. Boggs' efforts failed and the suit was pressed against the Voorhees Estate (1; JA 90-91, 300-305).

On June 12, 1940, attorneys for the Voorhees Estate wrote the Bank (and the Bank in turn forwarded copies to RFC's Philadelphia and Washington offices), reviewing the conference held at the Trenton Banking Company on June 4 and complaining that RFC had given petitioner and the other notemakers "special benefits and concessions" denied to the Voorhees Estate. The letter stated, "We were advised that the plan of settlement contained in letter of Reconstruction Finance Corporation dated March 20, 1940, was no longer available to the Voorhees Estate, although it had been made available to and consummated by Messrs. Bedford, Conner, Cartlidge and the Estates of Richard C. Chamberlain and Siegfried Roebling[21] . . ." (17, 18).

On June 18, 1940, the balance on the Roebling note was paid. On June 21, Wharton wrote Boggs to this effect. Wharton went on to say, "Under the circumstances, the last possible impediment to releasing preferred stock A to Mrs. Mary G. Roebling, when the same is available for release, would seem to be removed" (21) RFC never responded to this letter. RFC refunded the petitioner's pro rata share of the foreclosure expenses on July 22, 1940. On July 29, 1940, Wharton wrote RFC (attention of Boggs) that, "I presume when you send your letter to me it will be rewritten in the light of the latest developments concerning the Voorhees note" (28). This was acknowledged August 1, 1940, by Griffin, who, with the approval of RFC's Board had, on April 3, 1940,

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[21] Although copies of these letters were found in RFC's files, it never took the position that the plan of settlement had not been consummated with the Roeblings whereby stock or assets were to be eventually released to Mrs. Roebling.

written Scott that all matters relating to, among others, the Directors' notes problem should be referred to "either Mr. McGrath, Mr. Durr or this office [the Examining Division]" (29, 75).

On December 14, 1940, Wharton again wrote RFC requesting answers to his letters of May 20, and July 29, 1940. Wharton stated that he was very anxious to have a "definite understanding with respect to Mrs. Roebling's position."[22] He raised the problem of dissolving Trentrusco. Wharton again wrote respondent on December 27, 1940, requesting an answer to his earlier letters (31, 32).

**Ratification of Agreement and Transfer of Stock to Petitioner**

Having received no reply, Wharton, some five months later on May 16, 1941, wrote to respondent referring to his letters of May 20, 1940, June 21, 1940, July 29, 1940, December 14 and 27, 1940. He stated that he was "very anxious to reach a definite understanding with respect to Mrs. Roebling's position in the premises". On June 1, 1941, the RFC Board authorized the transfer of 1200 shares of preferred stock A (retirement value of $24,000) to petitioner. On June 11, 1941, at Boggs' request, Wharton met with him in Washington. Boggs informed him that the RFC's Board had just authorized the release of 1200 shares of preferred stock A to petitioner and that such shares were all that the then status of the collateral would permit to be released (33).

Thereafter, Wharton wrote RFC asking to be advised of what further developments had transpired with respect to the release of the 1200 shares to petitioner. Boggs replied on September 12, 1941 that the Philadelphia Agency had been instructed on August 13, 1941 to release 1200 shares to petitioner. On September 22, 1941, Wharton again wrote RFC (attention of Boggs) reminding him that when he had talked with Boggs in Washington (on June 11, 1941), they had

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[22] Wharton was attempting to obtain an understanding as to the number of shares to be released to petitioner at that time. He used the same language in his letter of May 16, 1941, and again, on September 22, 1941, he wrote in the same terms, even though RFC had authorized the release of 1200 shares in June 1941 about which Wharton knew.

discussed the release of further shares. He reminded Boggs of the agreement between them when petitioner purchased the stock released to certain of the notemakers the previous spring[23] (41, 42, 43).

**Acquiescence in May 20th Agreement**

On September 24, 1941, the Philadelphia Agency forwarded to petitioner a copy of a release to be executed by her in connection with the transfer of the 1200 shares to her. On October 2, 1941, Wharton wrote Philadelphia concerning the proposed release to be executed by petitioner. He stated that if it related only to 1200 shares it would be acceptable. He again reiterated the agreement entered into with Boggs in May of 1940. Wharton sent a copy of this letter to RFC in Washington by letter dated October 2, 1941. Scott forwarded a copy of Wharton's letter of October 2, 1941 (in which the agreement with RFC was again repeated) to R. J. Taylor, Assistant Chief of RFC's Examining Division.[24] Scott sought advice as to whether this release related only to the 1200 shares as set forth in Wharton's letter and what sort of certification should be used, namely, whether it was a sale of these 1200 shares[25] (44, 45, 48).

Scott's inquiry was answered by a letter dated November 4 and signed by H. W. Chadduck, Administrative Assistant of the Examining Division. Chadduck stated that Scott's inquiry and Wharton's letter were "referred to Mr. Boggs of the Special Services Section, who has heretofore handled all matters pertaining to the release of preferred stock A of Trenton Trust Company stock." He then stated that Boggs advised that a reply would be made "within the next few days" (51).

No reply was received by November 7, when Scott wrote Boggs, forwarding him a draft of a reply to Wharton's letter of October 2. Scott commenced his letter to Boggs by stating that, "In order not to complicate or in any way affect any arrangement you may have with Mrs. Roebling or her attorney, we

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23 Respondent never replied or otherwise denied that there was any such agreement.

24 Respondent did not take a position on either of these occasions that there was no such agreement.

25 Washington did not make any reply to deny that there was any such agreement.

deem it advisable"[26] that you know and pass upon our reply to Wharton in answer to his letter of October 2, 1941, relative to the transfer of 1200 shares of preferred stock A of Trenton Trust Company to petitioner. Boggs replied that the first and third paragraphs were satisfactory. He suggested that the second paragraph relating to the amount of transfer stamps which should be affixed to the certificate should be referred to counsel (52, 53).

Scott again wrote Boggs on November 17 in regard to the second paragraph of the reply. Agency counsel advised Scott that in order to determine the amount of Federal stamps involved, "it was necessary to know whether or not such transfer constitutes a sale and, if so, the selling price per share. If the selling price is less than $20.00 per share, a certain amount in stamps is required, whereas if the selling price is $20.00 or more per share, an additional amount is required." Not having received a reply, Scott wrote Boggs on December 11, 1941, seeking such a reply. Boggs never answered Scott's inquiries. Instead, he wrote Wharton and asked him to come to Washington for a conference (54, 55, 56).

On January 21, 1942, Wharton conferred with Messrs. Boggs, McGrath and Bowman MacArthur, a member of the General Counsel's staff.[27] Wharton returned home and wrote the Philadelphia Agency (attention of Mr. Ralston) concerning that which had transpired at the Washington conference. He stated that,

> "After considerable discussion as to the basis upon which the 1200 shares of preferred stock 'A' of the Trenton Trust Company was to be delivered by the Corporation to Mrs. Roebling, I was advised that the retirement value of $20.00 a share was the proper basis and that Federal documentary stamps in the amount of $4.32 should be affixed. I was also

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[26] Even though it responded to the Philadelphia Agency's letter, respondent did not take the position that there was no such agreement.

[27] Wharton testified that he related the terms of the agreement to McGrath in the presence of Boggs and MacArthur. McGrath told Wharton that he could keep all records or memoranda he wished with respect to the agreement, and that although RFC would never dispute the agreement it simply was not going to put anything in writing (JA 188).

> advised that Paragraph 3 of the agreement, which you propose to have executed by Mrs. Roebling and which reads that 'Transferee acknowledges and agrees that such transfer is made by R.F.C. without representation, warranty, or recourse of any kind or character whatsoever,' relates only to the one transaction involving the 1,200 shares of stock in question." (58).

A copy of this letter was forwarded to Boggs by Walton, Acting Manager at Philadelphia, by letter of January 27, 1942, in which Walton asked Boggs to confirm the statements made by Wharton answering the inquiries in the November 17, 1941, letter of Scott (60).

On January 28, 1942, Boggs replied to Walton's letter and stated that the matter as stated by Wharton (in his letter to Philadelphia), "is in accordance with our understanding and you can proceed on that basis" (61). In the interim, on January 24, 1942, Wharton again wrote RFC, forwarding a copy of his letter to the Philadelphia Agency. He stated that,

> "As a result of our very satisfactory conference on Wednesday last, I trust that there will be no further difficulty about transferring this stock or about any future matters relating to Mrs. Roebling's interest in the former assets of the Trentrusco Corporation which may be released to her by the [RFC] Corporation if and as the situation permits."[28]

No reply was ever received to this letter by Wharton. On February 5, 1942, petitioner received the certificate covering the 1200 shares released to her by respondent[29] (59).

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[28] Respondent did not inform Wharton or Philadelphia (to which was sent a copy of Wharton's letter) that there was no agreement regarding any future releases of stock.

[29] RFC, at various stages of the first trial and appeal and second trial of this action, has taken varying positions in regard to the release of these 1200 shares. First, despite the fact that exhibits 44, 45, 47, 48, 52, 53, 54, 58, 60 and 61 conclusively show that the general release given in connection solely with these 1200 shares was subject to petitioner's agreement with RFC, it claimed that the release released all petitioner's claims against RFC and precluded her from recovery on the agreement of about May 20, 1940. It took this position even though it could never explain the consideration or reason for its release of such 1200 shares. In appellee's brief on the first appeal it contended that the 1200 shares had a consideration independent of the agreement of about May 20, 1940. Upon questioning by the Court (Chief Judge Prettyman, Judges Fahy and Bazelon) at the oral argument on the first appeal, RFC counsel stated that RFC had simply made an "illegal gift" of the 1200 shares to petitioner.

Wharton testified that at a conference with Boggs in Washington in April 1946, he inquired as to the status of the collateral. Mr. Boggs told him that he was no longer in charge of that department and hence had no knowledge as to the liquidation of the collateral, but that no further release to petitioner would be made until both $2,000,000 loans were paid (JA 190, 191). Petitioner reluctantly acquiesced in this modification of the agreement. The litigation by the Bank against the Voorhees Estate went to trial in May 1942. On or about May 27, 1942, a compromise was reached whereby the total indebtedness of $106,843.78, which included $11,511.31 in interest, was settled for $78,247.78. The difference between the two figures, or $28,596, represented the 4,766 shares of stock that would have been available to the estate had it accepted the offer of RFC and then sold these shares to petitioner at $6 a share (59; JA 190-191).

On or about May 13, 1954, the remaining balance of the $4,000,000 loans was satisfied in full. On June 2, 1954, through her attorneys, petitioner made oral demand of George E. McConley, Esquire, RFC's General Counsel, for that to which she was entitled. He requested that such demand be reduced to writing. Petitioner complied and by letter dated June 11, 1954, from her attorney, Wharton, her claim was set forth in writing. Such demand was ignored by respondent and the present action was filed on June 30, 1954.

## REASONS FOR GRANTING THE WRIT

### I.

The decision of the Court of Appeals in the instant case is in direct conflict with the controlling decisions of this Honorable Court and those of four Circuit Courts of Appeal involving substantially identical facts.

It conflicts with the leading decision of this Court in Chesapeake & Ohio Ry. Co. v. Martin, 283 U.S. 209, 215-220, 51 S.Ct. 453, 75 L.Ed. 983 (1931), as well as the decisions in Pence v. U. S., 316 U.S. 332, 339, 340, 62 S.Ct. 1080, 86 L.Ed. 1510 (1942); Twentieth Century-Fox Film Corp. v. Dieckhaus, 153 F.2d 893, cert.den. 329 U.S. 716, 67 S.Ct. 46 (1946).

The Chesapeake & Ohio case, supra, involved a suit for damages for "misdelivery" of a carload of potatoes. The main question before the Court was whether twenty days was a reasonable time for the delivery of the car to the consignee. The potatoes had been moved from point of origin to the Richmond Yards in six days. However, they were not delivered to the consignee until fourteen days thereafter. The Railway's agent at its freight office in Richmond, on the basis of his 20 years of employment, testified that delivery could reasonably have been made within 48 hours. There was no other testimony. There was a demurrer to the evidence. The Court allowed the question to go to the jury which found that delivery within 20 days was reasonable. Dismissal of the action by the State Supreme Court was affirmed by the Fourth Circuit Court of Appeals.

Mr. Justice Sutherland, speaking for an unanimous court, reversed the trial court and laid down the rule that has been universally followed by most of the Circuit Courts of Appeal, at page 216, as follows:

> "We recognize the general rule, of course, as stated by both courts below, that the question of the credibility of witnesses is one for the jury alone; but this does not mean that the jury is at liberty, under the guise of passing upon the credibility of a witness, to disregard his testimony, when from no reasonable point of view is it open to doubt. The complete testimony of the agent in this case appears in the record. A reading of it discloses no lack of candor on his part. It was not shaken by cross-examination; indeed, upon this point, there was no cross-examination. Its accuracy was not controverted by proof or circumstance, directly or inferentially; and it is difficult to see why, if inaccurate, it readily could not have been shown to be so. The witness was not impeached; and there is nothing in the record which reflects unfavorably upon his credibility. The only possible ground for submitting the question to the jury as one of fact was that the witness was an employee of the petitioner. In the circumstances above detailed, we are of opinion that this was not enough to take the question to the jury, and that the court should have so held.

"It is true that numerous expressions are to be found in the decisions to the effect that the credibility of an interested witness always must be submitted to the jury, and that that body is at liberty to reject his testimony upon the sole ground of his interest. But these broad generalizations cannot be accepted without qualification. Such a variety of differing facts, however, is disclosed by the cases that no useful purpose would be served by an attempt to review them. In many, if not most of them, there were circumstances tending to cast suspicion upon the testimony or upon the witness, apart from the fact that he was interested. We have been unable to find any decision enforcing such a rule where the facts and circumstances were comparable to those here disclosed. Applied to such facts and circumstances, the rule, by the clear weight of authority, is definitely to the contrary. * * *"

Here, as there, Mr. Wharton, the principal witness, was candid. He was not shaken by two whole days of intensive cross-examination. His testimony was completely corroborated by Mr. Matlack, a witness who represented interests opposed to that of petitioner's position. The accuracy of Wharton's testimony was not controverted by proof or circumstances, directly or inferentially. It is difficult to see why, if it were inaccurate, that RFC could not readily have shown it to be so, as it possessed all the records and documents surrounding the transaction.

In fact, the records and documents found in RFC files corroborated Wharton's testimony. The action of RFC in transferring to petitioner 1200 shares of stock held by it could be explained only by the agreement as testified to by Wharton. RFC's counsel tried to create suspicion and doubt by contending that the Board of Directors of RFC had made an illegal gift of 1200 shares or $24,000 to petitioner. This attempt to disregard evidence of proper action by RFC was not only against the presumption of regularity, but had no evidence in the record to support it, other than RFC's counsel's oral argument to the Court.

It is well settled that suspicion or doubt cast by counsel, which has no support in the record, must be disregarded,

rather than followed as in the case at bar. This was made clear in Twentieth Century-Fox Film Corp. v. Dieckhaus, 153 F.2d 893 (8th Cir. 1946), cert.den. 329 U.S. 716 (1946), where the factual situation in regard to the record evidence was identical to that in the case at bar.

The Eighth Circuit, in following this Court's decision in the Chesapeake & Ohio case, supra, restated the rule as follows, at pages 899-900:

> "Although our circuit has not had occasion to declare the law in cases involving plagiarism, it is thoroughly committed upon mature consideration to the doctrine that the law does not permit the oath of credible witnesses testifying to matters within their knowledge to be disregarded because of suspicion that they may be lying. There must be impeachment of such witnesses or substantial contradictions, or if the circumstances raise doubts, they must be inconsistent with the positive sworn evidence on the exact point. The most that can be claimed for the result of the comparison between the book and the picture in this case is that it raises a doubt or suspicion that defendant might have had access. The suspicion cannot stand against the oaths of the witnesses who know the facts. We denied power in the fact finding body to find in disregard of this settled law. American Smelting & R. Co. v. National Labor Relations Board, 8 Cir. 126, F.2d 680, loc.cit. 688. See also Chesapeake & O. R. Co. v. Martin, 283 U.S. 209, 216, 217, 51 S.Ct. 453, 75 L.Ed. 983; Cf. Massachusetts Protective Assn. v. Mouber, 8 Cir. 110 F.2d 203, 206, 207.
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> "The comparison here, when it is made in the atmosphere of the synopses of plaintiff's able counsel, does arouse speculation and it may be suspicion as to how the similarities may have come about. But the function of the court is to apply the law so as to uphold property right in literary composition and not to undermine it or render it precarious, both for the obscure author who has only his own labor in his product and for the producing corporations which have millions invested in their literary properties. Both must be made subject to and be

afforded the protection of adjudication which is rested on the evidence of witnesses who know the facts and swear to them as against circumstantial evidence which merely arouses speculation or suspicion. As the evidence here, when given the effect the law requires, proves that the defendant did not have access to the plaintiff's book, the decree in her favor based as we have determined on error law, must be reversed and the case dismissed at her costs."

In addition to the conflict between the case at bar and the decision of the Eighth Circuit in Twentieth Century-Fox Film v. Dieckhaus, 153 F.2d 893, cert. den. 329 U.S. 716 (1946), the case at bar is in direct conflict with the decision of the Fifth Circuit in United States v. Johnson, 208 F.2d 729, 730 (5th Cir. 1953), and the Tenth Circuit in Nicholas v. Davis, 204 F.2d 200 (10th Cir. 1953). Moreover, the Circuit's decision in the present case cannot be reconciled with its decision in Stone v. Stone, 78 U.S. App. D.C. 5 136 F.2d 761 (D.C. Cir. 1943).

United States v. Johnson, supra, involved an action for the conversion of certain cotton purchased by Johnson and which was alleged to have been subject to a chattel mortgage. Johnson admitted the purchase but denied knowledge of the mortgage. He also contended that prior to such purchase from the mortgagor, the plaintiff had given its consent to make such sales as were made to him. Plaintiff's witness Jones testified that the note dated February 13, 1946 and the crop and chattel mortgage dated May 27, 1946, were executed at the same time. He also explained why the dates on the two instruments were different.

The trial Judge was quoted at page 730 as saying that:

"'Mr. Jones' testimony is impeached by the document itself, and it gives no explanation as to why the note would bear one date and the mortgage another. In view of that situation, we must hold that the paper would prevail, and that the execution of the mortgage was not a part of the consideration of extending the debt.'"

The trial court held that the mortgage was without consideration. The plaintiff appealed on the grounds that

(1) the undisputed proof established that the mortgage and note were executed at the same time, the extension of the note being the consideration for the mortgage, and (2) if the mortgage were given for a pre-existing debt, the defendant was not a bona fide purchaser as to it.

In accepting plaintiff's position and reversing the trial court, the Court of Appeals said at page 730:

> "We find ourselves in agreement with appellant on both propositions. The evidence of the witness Jones, that note and mortgage were executed on the same date, was unimpeached and uncontradicted, and its credibility was in no manner brought in question. This being so, the district judge could not reject his testimony or find contrary thereto. Gibson v. Southern Pac. Co., 5 Cir., 67 F.2d 758, cited by appellee, is not to the contrary, for there there were contradicting and discrediting facts and circumstances which made a fact issue. Here there are none, and the district judge did not find that there were. His action was based on his view that the conflicting dates on the instruments could not be explained by parol. It was error to so hold."

On similar facts in Nicholas v. Davis, 204 F.2d 200 (1953) the Tenth Circuit followed this court's opinion in the Chesapeake and Ohio case, supra, and held contrary to the case at bar. There the Internal Revenue collector offered no evidence and neither cross-examination nor other circumstances, reflected in the record, in anywise impeached or contradicted the evidence adduced in behalf of witness John R. Davis, nor cast any doubt on its verity. No part of such evidence was inherently improbable. Any doubt of bona fides that might have arisen from the fact that the contribution of Estella A. Davis to the capital of the second partnership was funds received by her through a gift from John R. Davis was completely overcome by the proof that Estella A. Davis received her full share of the distributions of partnership profits; that she exercised complete domination and control over them; that none of them were expended for household or family expenses; and that John R. Davis received no benefit from them and in nowise dominated or controlled them.

On the basis of a record containing such evidence, the Tenth Circuit stated, at page 202:

> "When controlling, positive, and uncontradicted evidence is introduced, and when it is unimpeached by cross-examination or otherwise, is not inherently improper, and no circumstances reflected on the record casts doubt on its verity, then under the principles laid down in Chesapeake & Ohio Ry. Co. v. Martin, 283 U.S. 209, 215-220, 51 S.Ct. 453, 75 L.Ed 983, it may not be disregarded, even though adduced from interested witnesses and no question of credibility or issue of fact is presented for determination by the jury."

The Court of Appeals for the District of Columbia Circuit on similar facts, in a holding contrary to the case at bar, in Stone v. Stone, 78 U.S. App. D.C. 5, 136 F.2d 761 (1943), stated at page 764:

> "In this case there was positive testimony, uncontradicted, and not inherently improbable. Neither a jury nor a judge is at liberty to disregard such evidence. '* * * where the testimony is all one way and is not immaterial, irrelevant, improbable, inconsistent, contradicted, or discredited, such testimony cannot be disregarded, or ignored by judge or jury, and if one or the other makes a finding which is contrary to such evidence, or which is not supported by it, an error results, for which the verdict or decision, if reviewable, must be set aside. To hold otherwise would vest triers of the facts in cases subject to review with authority to disregard the rules of evidence which safeguard the liberty and estate of the citizen. Kelly v. Jackson, 6 Pet. 622, 631, 8 L.Ed. 523'."

II.

A ruling upon the respondent's motion under Rule 41(b) of the Federal Rules of Civil Procedure constituted an adjudication of the case upon the merits. The amendment to this rule recommended by the Advisory Committee on Rules for Civil Procedure in 1946 and effective March 19, 1948, provided:

"In an action tried by the Court without a jury the court as tryer of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a)." (Emphasis supplied)[30]

The amendment to Rule 41(b) sets forth the decisive judicial function of terminating the case before the presentation of evidence by the defendant in language clearly importing the necessity of an exercise of sound judicial discretion. The judge may "render judgment against the plaintiff" or may "decline to render any judgment until the close of all the evidence." Compare Rawleigh, Moses & Co. v. Kornberg, 210 F.2d 176 (8th Cir. 1954), and Whitley v. Powell, 159 F.2d 625 (4th Cir. 1946).

Petitioner respectfully submits that this Court should interpret the degree of discretion accorded to a trial judge under the language of this Rule. Such an interpretation is needed in the interest of clarifying for both the judiciary and litigants the scope of authority vested in District Court Judges pursuant to the rule. This need is particularly great in cases like the present where the record upon which the petitioner's case was dismissed contains unimpeached, uncontradicted and rationally probative evidence which is corroborated, and which leaves material acts of record of the respondent unexplained except insofar as they support

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[30] The adoption of this amendment appears to have resolved the then existing conflict as to whether a judge in ruling upon such a motion should evaluate the testimony as would a jury, the view adopted by three circuits Young v. United States, 111 F.2d 823 (9th Cir. 1940); Gary Theater Co. v. Columbia Pictures Corporation, 120 F.2d 891 (7th Cir. 1941); Bach v. Friden Calculating Machine Co., Inc., 148 F.2d 407 (6th Cir. 1945); or whether a judge should decide only if there were sufficient evidence to support a possible judgment for a plaintiff, the position of the Third Circuit in Federal Deposit Insurance Corp. v. Mason, 115 F.2d 548 (1940), and Schad v. Twentieth Century-Fox Film Corp., 136 F.2d 991 (1943). The former view was adopted in the amendment. See the Report of the Advisory Committee on the Federal Rules of Civil Procedure, 5 F.R.D. 434; at 466

petitioner as being performed directly pursuant to the acts alleged and proved by the petitioner as the basis for her claim.

The harsh effects of such an interpretation are evidenced by the results in the case at bar. The petitioner presented unimpeached and corroborated testimony covering all the essential elements of her claims for breach of an express oral contract, or one implied-in-fact, or for relief in quasi-contract. The petitioner also introduced documentary evidence from the files of the respondent showing acts for which there was no explanation in the record, except that they were performed pursuant to the claims sued upon.

For example, the Reconstruction Finance Corporation transferred 1200 shares of stock to petitioner on June 6, 1941, under direct authorization of its governing board of directors. The only documentary and testimonial evidence regarding this transfer and explaining respondent's action, supported the petitioner's claim and the evidence introduced to the effect that the transfer was pursuant to an agreement between the respondent and the petitioner and other note-makers. Assuming, arguendo, that none of such supporting evidence was of probative value, the presumption of regularity would support the view that the respondent's directors had a valid and lawful reason for their action, which presumption should prevail until rebutted.

The finding prepared by counsel for respondent (Finding XVIII, JA 530), and adopted without change by the trial court merely stated that such a transfer had been made, without relating this in any way to the other evidence on the alleged express or implied contract, or possible quasi-contractual relief. The Court of Appeals specifically singled out this transaction as having probative value, in footnote 3, page 3 of its present opinion.[31]

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[31] The opinion of the Court of Appeals, with respect to quasi-contractual relief, states, at pages 2 and 3 that:

> "• • • plaintiff's evidence fails to show that RFC would not be entitled to any benefit received as a result of the transations set forth in our previous opinion. Disregarding for the moment the question whether the parties acted pursuant to an agreement, in order for

(continued on following page)

Similarly, the Court of Appeals found probative value in the marginal note made by an authorized representative of the respondent to the effect that stock would not be transferred to the Roebling estate until all of the preferred stock loan was paid. Opinion of the Court of Appeals, footnote 3, pages 3, 4. This factor was not dealt with anywhere in the trial court's findings as prepared by counsel for respondent.[32]

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31 (continued from preceding page)
plaintiff to establish unjust enrichment the benefit must be shown to have been unjustly retained. Bailis v. Reconstruction Finance Corp., 128 F.2d 857 (3rd Cir. 1942). We do not think plaintiff has shown this. The manner in which she attempted to resolve the dispute which had arisen over the notes is consistent with her natural desire to restore the banking corporation of which she was a major shareholder, to a sound financial condition. Nor do the facts show that RFC was not entitled to retain any benefit it received." (Emphasis supplied)

Counsel for respondent had adopted this rationale in his arguments at trial and incorporated them in Finding XIX (JA 531) and Conclusion of Law Number 3 (JA 533, 534). These were adopted without change by the trial court. Petitioner's evidence had established that RFC recognized a responsibility to the other notemakers, transferring to them or their estates, shares of stock the par value of which was approximately equal to the face value of their notes. RFC recognized its obligation to petitioner to the extent of 1200 shares of stock, the face value of which was only slightly more than ten per cent of the value of the Roebling note. The two $2,000,000 loans were repaid to RFC in full with interest, yet it retained the stock also.

In the light of this record, the language of the Court of Appeals with respect to the petitioner's failure to show any unjust retention of profits by the RFC should be compared with the statement of Mr. Justice Cardozo in Baltimore National Bank v. State Tax Commission, 297 U.S. 209, 56 S.Ct. 417 (1936), at page 211, as follows:

"* * * The Reconstruction Finance Corporation was organized in 1932 to give relief to financial institutions in a national emergency and for other and kindred ends * * *. At the time of its creation and continuously thereafter the United States has been and is the sole owner of the shares. The purpose that it has aimed to serve is not for profit to the government, though profit may at times result from one or more of its activities. The purpose to be served is the rehabilitation of finance and industry and commerce, threatened with prostration as a result of the great depression."

32 The probative value of this statement, while of less import by itself than the transfer of 1200 shares, is enhanced by the fact that it was written on a memorandum found in respondent's files and which memorandum raised Mr. Wharton's question as to whether the respondent could release preferred stock to Mrs. Roebling rather than the Roebling estate. (EX B, JA 481). The subsequent transfer by the RFC of the 1200 shares of stock to the petitioner should likewise have been considered in the light of this marginal note, indicating that RFC was acting on the premise that any profit was to be returned to petitioner.

No record evidence, either contrary to or contradictory of the plaintiff's position with respect to the two vital facts referred to by the Court of Appeals, or contradictory of any other facts in evidence, was introduced into the record. Petitioner respectfully submits that the trial court's findings under these circumstances, ignoring the effect of the petitioner's evidence and the logical inferences to be drawn therefrom, particularly in view of the recognition by the Court of Appeals of the probative value of such evidence, constituted an abuse of discretion. For, it appears from the record, that the findings prepared by respondent's counsel and adopted by the court drew inferences completely unsupported by record evidence, which were directly contradictory of such evidence, without the slightest showing of any reason for ignoring or disbelieving the evidence introduced. The posture of the evidence at the close of the petitioner's case precluded a finding for the respondent. Had the respondent's motion been denied and had proof been introduced as a basis for the presently unsupported inferences, then the trial court may or may not have had a basis for a determination against the petitioner. To draw such inferences against the petitioner's case without any support, however, petitioner respectfully submits, constitutes an abuse of judicial discretion.

The error not having been corrected by the Circuit Court of Appeals upon its review, it is now within the province of the Supreme Court to declare whether or not the dismissal under these circumstances constitutes an abuse of discretion which renders meaningless the permissive language of Rule 41(b) of the Federal Rules of Civil Procedure.

If, on the basis of such a record, the trial court can dismiss the action without requiring the production of evidence from the defendant to contradict plaintiff's corroborated evidence, or at least to furnish an alternative explanation of record to support the arguments of counsel for a defendant which are adopted in the court's finding, then the discretion under the Rule must be absolute and unfettered. If this be the case, plaintiffs will find themselves subjected to dismissal on the basis of conjecture and speculation.

III

The Court of Appeals in the case at bar erred in accepting the findings of fact of the District Court apparently on the assumption that the "clearly erroneous" rule applies where, as in this case, the evidence was largely documentary and the testimony was uncontradicted. The findings of the District Court here were not based on any evidence in the record, but rather on RFC counsel's suspicion (as discussed in I above).

Where the findings are based on inferences drawn from exhibits, documents and uncontradicted testimony, rather than on the conflicting testimony of witnesses whose credibility is for the District Court, such findings are fully subject to review. Southern States Equipment Corp. v. USCO Power Equipment Corp., 209 F.2d 111 (5th Cir. 1953); Stewart-Warner Corp. v. Lone Star Gas Co., 195 F.2d 645, 647, 648 (5th Cir. 1952).

The Court of Appeals has now ruled: (1) as to the claim of unjust enrichment, petitioner's evidence "fails to show that RFC would not be entitled to any benefit received as a result of the transaction" in question; (2) in determining the existence of an implied-in-fact contract, "the conduct of the parties is to be viewed as a reasonable man would view it in all the circumstances," and "We are unable to say here that the conduct of the parties clearly enough reveals a promise by RFC to release shares of stock or other assets to plaintiff [petitioner] when conditions permitted as she contends;" and (3) although direct evidence is not necessary to establish an express contract, "we think the testimony as to these negotiations does not measure up to the burden [petitioner] must assume to establish the existence of a definite promise on the part of RFC to obligate itself to [petitioner]" and "We reach the same conclusion with respect to the contention that the conduct of RFC cannot be explained except on the basis of the existence of a contract." While there is "some support for this contention," the opinion continues, "we cannot say that the District Court should have resolved the doubtful issue in favor of [petitioner]; (s)he simply was not able to sustain her burden of establishing an express contract."

The "support" for the contention of a contract is given in a footnote: "The otherwise unexplained release of 1200

shares of preferred A stock to Mary Roebling in 1942, authorized by the RFC in June 1941, lends some support to the contention that an express agreement existed between [petitioner] and RFC. And the notation concerning release of stock to [petitioner] made by Durr of the RFC on a letter dated April 19, 1940, although the notation may have been made at an earlier stage in the negotiations, is also probative to some degree."

The release of 1200 shares of the preferred A stock to the petitioner, "authorized by the RFC in June 1941," is cogent corroborative evidence of the existence of the claimed contract, for it was indeed a course taken pursuant to the formally-expressed corporate action of the RFC itself that, unexplained, is palpably inconsistent with the RFC's contention that there was no such contract. And the notation relating to the release of stock of the given class made by Durr, the RFC's Assistant General Counsel in charge of the negotiations, on the letter of April 1940 is to the same effect.

Absent an explanation contra, the evidence in question should have its rational probative force. It is clear and convincing proof of the making of a contract such as the petitioner claims. The RFC denied the existence of any such contract and, if this were so, then its turnover of 1200 shares of stock to the petitioner was wholly without warrant in law. The latter is the sole alternative to the hypothesis of no such contract; and it is utterly unreasonable to assume that the stock was transferred to the petitioner as a gift and not in the fulfillment of an obligation in contract. Otherwise, there is no conceivable consideration for the transfer of the stock. Durr's notation on the letter of April 19, 1940, has the very same import. It is not to be supposed that by the transfer of the stock to the petitioner, there was a misappropriation of the RFC's property.

And the repayment of the pro rata shares of the foreclosure expenses advanced by the Chamberlain Estate and the petitioner prior to the making of the pleaded agreement is another equally persuasive circumstance.

The trial judge's remarks immediately upon the conclusion of counsel for respondent's oral motion to dismiss

were to the effect that "the plaintiff has failed to make out a prima facie case upon any of her claims." This leaves in serious doubt whether the trial court ever intended to make any determination as to either weight or credibility to be accorded evidence and testimony, but rather leads to the conclusion that it had taken all of the petitioner's evidence at its face value, for its truth, and assuming the truth thereof, had found as a matter of law that she had not proved the elements of her claims. To the contrary, the findings of the court prepared by counsel for respondent are not predicated upon any assumption of the truth of the matters of record introduced by petitioner. Instead, in numerous respects the findings directly derogate from the truth of record evidence.

The arbitrary and erroneous nature of the findings in this respect is exemplified by the trial court's adoption of the statement as Finding XVII that, "T. Girard Wharton's correspondenoe as plaintiff's attorney to Reconstruction shows only that he recognized that plaintiff had no contract * * *" (emphasis supplied).

This finding is not only in direct contradiction to Mr. Wharton's testimony and that of Mr. Matlack, as well as to the tenor of Mr. Wharton's correspondence over a long period, but is also in direct conflict with the action subsequently taken by the RFC with respect to its transfer of 1200 shares of stock to petitioner. In drafting this finding, respondent's counsel had to ignore and contradict (without explanation) not only Mr. Wharton's testimony, but all of the corroborative facts related thereto. Similarly, Finding XIX, to the effect that "No action or inducement of Reconstruction caused plaintiff to purchase said 11,200 shares from said three directors," flies in the face of both the documentary and testimonial evidence of record.

According to the trial judge's oral remarks, if it be assumed that he took the evidence at its face value, assumed its truth, and decided that as a matter of law it was unnecessary for him to assume the function as a finder of fact (acting in the capacity of a jury) to weigh it, then it is respectfully submitted that the Court of Appeals likewise should have accepted all of the evidence presented as true, together with all reasonable inferences in favor of petitioner's case in deciding the appeal. Unfortunately, the trial court's findings,

in contradistinction to the trial court's statement at the conclusion of petitioner's case, are predicated upon inferences drawn dehors the record (apparently from the argument of counsel), directly opposite to reasonable inferences and evidence introduced in support of petitioner's claim.

Under Rule 52(a), the finding of the trial judge cannot stand if the finding of the trial court was induced by an erroneous view of the law. Fields v. Ross Oil Co., 250 F.2d 498 (1957). If the finding is at most an inference from undisputed facts, the appellate court is in as good a position to draw an inference as was the trial court. Home Indemnity Co. of New York v. Standard Accident Ins. Co. of Detroit, 167 F.2d 919 (1948); Sears, Roebuck & Co. v. Johnson, 219 F.2d 590 (1955); United States v. One 1950 Buick Sedan, 231 F.2d 219 (1956). And where the finding of the trial court is actually on a question of law, and so is really a conclusion of law, the appellate court is not bound by such conclusion. In reviewing a question of law the appellate court is free to draw from the trial court's findings of fact the ultimate inferences and conclusions. Johnson v. United States, 168 F.2d 886 (1948); Walling v. Nashville C. & St. L. Ry., 155 F.2d 1016 (1946).

"A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Co., 333 U.S. 364, 68 S.Ct. 525, 92 L.Ed. 746 (1948).

Insofar as the "ultimate facts are simply the result reached by processes of legal reasoning from, or the interpretation of the legal significance of the evidentiary facts," they were held subject to review by the appellate court "free from the restraining influence of the clearly erroneous rule," 52(a), in Bullock v. Tamiami Trail Tours, Inc., 266 F.2d 326 (5th Cir. 1959), and the result there was that to "the extent that the inference of negligence is controlled by Rule 52(a)," the court "on the entire evidence 'is left with the definite and firm conviction that a mistake has been committed,'" citing United States v. United States Gypsum Co., supra. See also Galena Oaks Corporation v. Scofield, 218 F.2d 217 (1954).

It is the appellate court's "positive duty to reverse findings as clearly erroneous," when "the force and effect of the testimony considered as a whole convinces that the finding * * * does not reflect or represent the truth and right of the case," or when the court is "left with the definite and firm conviction that a mistake has been committed." Bishop v. United States, 266 F.2d 657 (1959).

In conclusion, if it be assumed that the trial court in holding that the petitioner did not make out a prima facie case, merely accepted all evidence of record for its truth, and made its decision, then its holding as to this matter of law was reviewable by the Court of Appeals without regard to the "clearly erroneous" rule. If, on the other hand, it is assumed that the trial court exercised the functions of a trier of facts and drew inferences directly contradictory to the record evidence, then its holdings were "clearly erroneous" as being directly opposed to uncontradicted and unimpeached record evidence of rationally probative value.

While the posture of the findings and the decision of the Court of Appeals presently under consideration appear to leave doubt as to the course the trial court took, your petitioner respectfully submits that in either event, the Court of Appeals decision compounds the error committed by the trial court. This is so because the Court of Appeals drew inferences in favor of the respondent in spite of the fact that the evidence in support of petitioner's case was uncontradicted.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 27, 1961.

APPENDIX A

UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

No. 13878

MARY G. ROEBLING, Appellant

v.

ROBERT B. ANDERSON, SECRETARY OF THE TREASURY, Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Decided May 15, 1958

Mr. John K. Pickens, with whom Messrs. M. Joseph Stoutenburgh and Jerry N. Griffin were on the brief, for appellant.

Mr. H. Clay Espey for appellee.

Before PRETTYMAN, BAZELON and FAHY, Circuit Judges

FAHY, Circuit Judge: The case is complicated in its details but in essence consists of the claim of Mary G. Roebling, plaintiff, to an accounting and possible recovery from the Reconstruction Finance Corporation, [1] based on contract, of sums retained or realized by it from collateral in excess of the amounts of loans it had made to the Trenton Trust Company of Trenton, New Jersey. Mary G. Roebling is the widow of Siegfried Roebling, who was a director of the Trust Company. For purposes of simplicity, since there is no issue as to the succession, we shall refer ordinarily to

[1] Robert B. Anderson, Secretary of the Treasury, was substituted for the RFC, as the functions of the latter were transferred to the Secretary pursuant to §§ 2(d), (e), and 3 of Reorganization Plan No. 1 of 1957, 22 Fed. Reg. 4633.

plaintiff and the interest of her deceased husband as Roebling.

Roebling sued in the District Court on the bases of (1) an express contract, (2) an implied agreement, and (3) a quasi-contract or unjust enrichment. The case was heard by the court without a jury. At the conclusion of Roebling's case the court granted RFC's motion to dismiss, giving as ground therefor that Roebling had failed to prove the express contract relied upon, and, further, that if such contract had been made it was too vague and indefinite to be enforced.

On her appeal from the ensuing judgment dismissing her complaint upon the merits, Roebling presents five points, two of which can be disposed of rather quickly. It is said that formal findings of fact and conclusions of law as required by Rules 52(a) and 41(b) of the F.R.Civ.P. were not made. In view of our disposition of the case this omission can be supplied on the remand. It is also contended that the trial court erred in refusing to admit certain testimony of prior dealings between Roebling and the Board of Directors of RFC. We think this was a matter within the sound discretion of the trial court which was not abused. But we leave the subject open for reconsideration by the trial court in the light of developments on the remand.

The three other questions presented by Roebling are: (1) there was a definite, legal, enforceable agreement; (2) if not, it was nevertheless error for the court to fail to rule upon the counts for breach of an implied-in-fact contract and quasi-contract;[2] and (3) error occurred in denial of Roebling's motion for production of additional documents under Rule 34 F.R.Civ.P.

Since we think the last point is well taken, as to be more fully explained, we do not definitely rule on the other two. For if additional documents are produced the factual problem as to a contract, express or implied or quasi, might vary from that now before the courts, even were we of the

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[2] Roebling appears to list unjust enrichment as a theory of recovery different from quasi-contract. Our understanding is that unjust enrichment is a basis upon which quasi-contract recovery can be obtained. See 1 Williston, Contracts 15 (3d ed. 1957).

opinion that the present record does not establish a contract of any kind.

We now set forth a somewhat lengthy statement of how the case arose, which seems necessary for the disposition of the discovery question.

In 1933 notes totalling $585,000 were given to the Trenton Trust Company by six of its directors, two of whom were Roebling ($200,000 note) and Voorhees ($100,000 note). In return approximately $585,000 of "slow assets" were put in trust by the bank for the benefit of the notemakers. In May 1934 RFC loaned $2,000,000 to the bank through the latter's subsidiary, the Trentrusco Corp. There was pledged with RFC as security 100,000 shares of Trenton Trust Company preferred A stock, par value $6.00, liquidation value $20.00, and $500,000 of the $585,000 slow assets which had been put in trust. This latter collateral was released by the trustees with approval of the notemakers. In September 1936 RFC loaned a second $2,000,000 to the bank in the form of a purchase of 100,000 shares of its preferred A stock.

The five directors other than Roebling claimed later that their notes were not primary obligations but for accommodation only. From 1936 to 1940 unsuccessful attempts were made by the bank, by Roebling and by RFC to induce the five directors to recognize their notes as primary obligations and to put them in bankable condition.

On February 23, 1940, RFC foreclosed the collateral of the first loan and acquired this collateral by bidding it in for the amounts of the principal then due on the loan note ($1,808,000).

On March 15, 1940, RFC authorized the offering of shares of preferred A stock to those directors, other than Roebling, who should pay or make bankable their notes. Stock would be given to them in amounts equivalent to the value of their respective notes at the rate of $20.00 per share. By April 19 director Chamberlain agreed to this. On May 17, 1940, however, RFC revoked this authorization but authorized the release of some 13,583 shares to the four directors other than Roebling and Voorhees provided they made their notes bankable, which, with the exception of Chamberlain, they failed to do.

Roebling alleges that then an oral contract was made between her and RFC in a series of conferences with RFC's representatives, ending prior to May 20, 1940, for the purpose of encouraging the directors other than Roebling and Voorhees to pay or make bankable their notes. The encouragement was to come through the creation by Roebling of a market for the stock which would be issued to them By the alleged contract, omitting some details, RFC would release to these directors shares of preferred A stock in amounts equivalent to their respective notes at the rate of $20.00 per share and would transfer to Roebling "all of such shares, or other assets . . . from time to time as sufficient equity for that purpose accrued in the collateral originally pledged with the defendant [RFC] to secure the $2,000,000 loan of May 23, 1934 . . ." provided that the directors would pay their notes or put them in bankable condition. Roebling would then purchase from the three directors other than Chamberlain, Voorhees, and herself, at $6.00 per share, the shares of stock released to them by the RFC.

Roebling contends that the details of the contract were evidenced by a letter of May 20, 1940, from Roebling's attorney to the authorized representative of RFC setting forth the attorney's understanding of the agreement. The letter was introduced in evidence.

Voorhees refused to pay or make bankable his note but by June 4, 1940, the others had done so. RFC accordingly delivered to each of them shares of preferred A stock, which Roebling then purchased from them for $6.00 per share, totaling $67,220 They applied the proceeds on the balances due on their notes. On June 18, 1940, Roebling made the last payment on her note, thus retiring it.

On June 1, 1941, RFC authorized transfer of 1200 shares of preferred A stock to Roebling provided she pay the expenses in connection with the transfer. The actual transfer was made in January or February 1942.

In December 1952 Trenton Trust Company retired the remaining 85,217 shares of preferred A stock used as collateral (100,000 less 14,783 shares given to the five directors, including Roebling) by paying to RFC $20.00 per share plus accrued dividends In this manner, with the

payments previously made, RFC recovered the amount of its first, 1934, loan. By May 1954 it had recovered the amount of its second, 1936 loan, when Roebling purchased from RFC the last 40,000 shares at $20.00 per share.

On the basis of the matters thus summarized Roebling filed her suit.

Roebling instituted pretrial discovery proceedings under F.R.Civ.P. 34, 3/ seeking the right to inspect certain files of RFC related to the loans. The files requested were:

1. Loan docket file, showing all transactions, collections and disbursements.

2. Files showing the transactions relating to (a) transfers or other disposition of all shares of Preferred Stock "A" of Trenton Trust Company held by defendant at any time during the period aforesaid [May 23, 1934 to June 29, 1954] and (b) the disposition of the additional collateral securing the first loan (all of which was foreclosed on February 23, 1940 and is itemized as Exhibit A to the Amended Complaint) during the period from February 23, 1940 to June 29, 1954.

3. Correspondence file.

4. Legal file.

5. Loan agreement or agreements.

6. Minutes of meetings of, and the transcript of all

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3/ F.R.Civ.P. 34:

"Upon motion of any party showing good cause therefor and upon notice to all other parties, and subject to the provisions of Rule 30(b), the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26(b) and which are in his possession, custody, or control . . ."

material remarks before, the Board of Directors of the defendant, Reconstruction Finance Corporation, concerning (1) said loans, (2) the authority of Messrs. McGrath Scott, Boggs, MacArthur and others to act in connection with said loan accounts, (3) the release of shares of said Preferred Stock "A" to plaintiff and other directors of said Trust Company and (4) the repayment by Reconstruction Finance Corporation of the foreclosure expenses to plaintiff and other said directors of the Trust Company.

7. Basic memoranda to appropriate division chiefs relating to all matters set forth in 6(1) through 6(4) above and memoranda based on such basic memoranda and prepared for the Board of Directors of the Reconstruction Finance Corporation by the examining and legal divisions of that Corporation or members of the staffs thereof.

8. Records relating to the duties, responsibilities and authority of all officers and employees of the Reconstruction Finance Corporation charged with responsibility for the Trenton Trust Company and/or the Trentrusco Corporation loan account or accounts, including all records relating to the duties, responsibilities, and authority of Messrs McGrath, Boggs, Ralston, Scott and MacArthur in connection therewith.

The District Court ordered RFC to file a list of those documents which were

> pertinent to the Trenton Trust Company and/or the Trentrusco Corporation loan account or accounts with the Defendant, from the period from May 23, 1934 to June 29, 1954, and to the alleged contract of May 20, 1940 upon which plaintiff relies in her action and which are relevant to the issues in this case. [Emphasis added.]

RFC duly filed a list, to which Roebling objected on the ground that it only partially complied with the order of the court, specifically that the documents RFC listed were concerned only with the express-contract issue and left out

documents concerning the contract-implied-in-fact and quasi-contract issues. RFC replied that the latter "necessarily are dependent upon the alleged express contract." The court overruled Roebling's objections.

The court did not state its reasons for this ruling, but it appears that RFC was required to produce only documents related to the express-contract theory of recovery. In our view such a limitation was not warranted. Though appellate courts will generally not interfere with a trial court's disposition of matters of discovery, they will do so when the ruling is "improvident and affect[s] the substantial rights of the parties." Carter v. Baltimore & O. R., 80 U.S. App. D.C. 257, 259, 152 F.2d 129, 131.

There is a difference between an express contract and one implied in fact.

> Contracts are express when their terms are stated by the parties and are often said to be implied when their terms are not so stated. The distinction is not based on legal effect but on the way in which mutual assent is manifested . . . [Contracts implied in fact are] obligations arising from mutual agreement and intent to promise but where the agreement and promise have not been expressed in words. 4/

There is also a difference between express contracts and quasi contracts, for in the latter mutual assent is not needed. As Williston states, quasi-contracts are

> imposed by law on the defendant irrespective of, and sometimes in violation of, his intention. 5/

RFC argues, however, that the motion to produce was defective in that the documents desired were inadequately designated and Roebling had asked for permission to make an unrestricted search of RFC's files. Assuming arguendo that such a request could not be granted, see Mercantile Metal & Ore Corp. v. American Gen. Supply Corp., 12 F.R.D.

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4/ 1 Williston, Contracts 8-11 (3d ed. 1957).

5/ Id. at 10.

345 (S.D. N.Y.); Frank v. Tinicum Metal Co., 11 F.R.D. 83 (E.D. Pa.); Kenealy v. Texas Co., 29 F. Supp. 502 (S.D. N.Y.), the better rule does not require that each specific paper be designated though there appear to be decisions to the contrary.[6] The requirements of Rule 34 were satisfied in this case[7] by a designation of documents by categories so long as the categories themselves were set forth with reasonable particularity,[8] which we think was done.[9]

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6/ See Martin-Parry Corp. v. C.A. Bader Co., 16 F.R.D. 465 (D. Conn.); Lundberg v. Welles, 11 F.R.D. 136 (S.D. N.Y.); and see Schwartz v. Boland & Cornelius, 16 F.R. Serv 26a.2, Case 1 (S.D. N.Y.); Forstmann Woolen Co. v. Manufacturer's Retail Men's Stores, 6 F.R.D. 224 (S.D. N.Y.); United States v. American Optical Co., 2 F.R.D. 534 (S.D. N.Y.); Archer v. Cornillaud, 41 F. Supp. 435 (W.D. Ky).

7/ Barron & Holtzoff have concluded that the test is a relative one, depending on the degree of knowledge that a movant has as to the documents he requests. See 2 Barron & Holtzoff, Federal Practice and Procedure 515 (Rules ed. 1950). We note also the following language of the Supreme Court in Consolidated Rendering Co. v. Vermont, 207 U.S. 541, applied to Rule 34 by Callaway v. Rolland Laboratories, Inc., 9 F.R.D. 88 (W.D. Mo.):

> We see no reason why all such books, papers and correspondence which related to the subject of the inquiry and were described with reasonable detail, should not be called for and the company directed to produce them. Otherwise, the State would be compelled to designate each particular paper which it desired, which presupposes an accurate knowledge of such papers, which the tribunal desiring the papers would probably rarely, if ever, have.

207 U.S. at 554.

8/ United States v. Certain Parcels of Land, 15 F.R.D. 224, 228 (S.D. Cal.); Leven v. Birrell, 13 F.R.D. 341 (S.D. N.Y.); Frank v. Tinicum Metal Co., 11 F.R.D. 83 (E.D. Pa.); Loew's Inc. v. Martin, 10 F.R.D. 143 (N.D. Ohio); Bunch v. General Motors Corp., 9 F.R.D. 683 (E.D. Tenn.); Simper v. Trimble, 9 F.R.D. 598 (W.D. Mo.). This view also finds support in the notes of the Advisory Committee on Amendments to the Rules, 28 U.S.C. p. 4322 (1952).

9/ United States v. United Shoe Mach. Corp., 76 F. Supp. 315, 317 (D. Mass.).

RFC also contends that good cause has not been shown as required by Rule 34 In Hickman v Taylor 329 U.S 495 the Court laid down some general guides on this aspect of the problem:

> [T]he disposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of "fishing expedition" serve to preclude a party from inquiring into the facts underlying his opponent's case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession. 10/

What constitutes good cause takes into account considerations of practical convenience. Barron & Holtzoff state that "the court should be satisfied that the production of the requested document is necessary to enable a party to prepare his case or that it will facilitate proof or aid in the progress of the trial." 11/ Moore summarizes it as follows:

> [T]here should be a showing that the documents sought to be inspected will in some way aid the moving party in the preparation of his case; that the documents are relevant to the issues; that the moving party must establish his claim or defense by documents, most of which are in the adverse party's possession; or that denial of production would unduly prejudice the preparation of the party's case or cause him hardship or injustice. 12/

Since it appears that Roebling, except for discovery, would be seriously disabled in obtaining evidence which might exist with respect to the decisions and intent of RFC in the early 1940s about the matters in litigation, a denial of the documents, it seems to us, would unduly prejudice her preparation. Here, in contrast with Hickman v. Taylor,

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10/ 329 U.S. at 507.

11/ 2 Barron & Holtzoff, Federal Practice and Procedure 497 (Rules ed. 1950).

12/ 4 Moore, Federal Practice 2450 (2d ed. 1950).

supra, and Martin v. Capital Transit Co., 83 U.S. App. D.C. 239, 170 F.2d 811, good cause for the most part has been shown 13/

However, we find that Roebling's request is in some respects too broad.

Category 1 14/ refers only to documents needed to establish damages if Roebling succeeds in her claim. These documents would serve no purpose now and can be obtained at the time, should it arise, that an accounting is ordered. See Rabinowitz v. Borish, 5 F.R. Serv. 34.41, Case 3 (D.N.J.)

Category 2 has been satisfied as far as need be. Roebling complains that the documents filed do not contain the records relating to the transfer of the last 184,217 shares of stock and the disposition of the collateral other than the stock. Any relevancy of such documents would be to the issue of damages.

Category 3 is relevant only within reasonable time limits, and only if construed as relating to correspondence about the matters in litigation. In the list of documents filed RFC went back as far as December 19, 1939, so we accept that date as to the relevancy of correspondence since then. We see no purpose in requiring the production of correspondence going back to 1934, as requested.

Category 5 has been abandoned by Roebling for the present and need not be produced.

Categories 4, 6, 7 and 8 we think are relevant and should be produced or made available for inspection. We note that in a paper filed in the District Court RFC states that letters and documents on legal matters are scattered through the correspondence and loan-documents files, and that it has no file denominated as "legal." We do not think that the categories requested mean that a file must have the name of the categories as stated, rather the categories are references to subject matters, and documents should not be withheld because RFC has another name for the files.

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13/ The RFC specifically stated to the District Court that it claimed no privilege. R. 308.

14/ These categories are quoted at p. 6, supra.

Upon such discovery being had, and upon supplementing of the record by such admissible evidence, if any, as might result, the case should be redecided on all counts, with due regard to the requirements of Rules 52(a) and 41(b) Eden v. Lauriat, 103 U.S. App. D.C. ___, 254 F.2d 339.

Implicit in our above rulings is a rejection at this time of certain defenses of appellee, as follows, upon which the District Court made no decision:

1. RFC contends that the action is barred by the statute of limitations and laches because it did not accrue, upon any theory of recovery, within three years preceding the filing of the complaint in August 1954. As the 1934 loan was not completely satisfied until December 1952 it would seem that the obligation of RFC under any contract which might have existed would not have accrued until then. Also to be considered is the claim of Roebling that in 1946 there was on the insistence of RFC a modification of the basic contract so that Roebling would be entitled to nothing until after both loans were satisfied. As stated above, the second, 1936, loan was not completely satisfied until May 1954.

2. RFC contends that the statute of frauds bars enforcement of any contract entered into. First, we think that the statute of frauds does not apply to a quasi-contract theory of recovery. 15/ Therefore even if it would bar recovery on the express-contract or contract-implied-in-fact theories it would not dispose of the case. Further, Roebling claims that part performance removes the contract from the application of the statute.

3. RFC contends that Roebling's claim merged in her 1954 purchase of the last 40,000 shares of stock from RFC on the ground that this purchase was inconsistent with the alleged basic contract. This does not necessarily follow. It depends upon the circumstances surrounding the purchase as well as the terms of the contract if one existed. For

15/ Wilkes v. Stacy Williams Co., 235 Ala. 343, 179 So. 245, 247-48; Olsen v. Fraxer, 154 Kan. 310, 118 P.2d 505; Berth v. W. G. Knapp Co., 215 App. Div. 693, 212 N.Y.S. 771 (2d Dept.); cf. Higgins v. Evans, 188 Mo. 627, 87 S.W. 973, 976; Muri v. Young, 75 Mont. 213, 245 Pac. 956, 958.

example, if there were a breach of contract on the part of RFC to turn over to Roebling the stock or other assets left in its hands after the notes were satisfied her purchase of the stock would not necessarily preclude consideration, in the accounting and recovery sought, of the amount she paid for it.

All three of these defenses involve questions of fact that may be affected by whatever evidence the further discovery proceedings may produce. We think their determination should be left to the trial judge upon his reexamination of the case.

Reversed and remanded for further proceedings consistent with this opinion.

[Filed February 11, 1960]

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

This civil action came on a second time for non-jury trial, and the Court, having heard and received the evidence for plaintiff and the stipulations of the parties, made during introduction of plaintiff's case in chief, and having received, when plaintiff rested her case, defendant's motion to dismiss plaintiff's amended complaint and her four separate claims under Federal Civil Rule 41 (b) on the ground that upon the facts and the law plaintiff had shown no right to relief, and the specific grounds stated in support thereof, having heard arguments of counsel for the parties thereon, and having duly considered plaintiff's evidence and the stipulations of the parties made during introduction of plaintiff's evidence, and having announced that said motion to dismiss should be granted, finds the facts and states its conclusions of law upon plaintiff's evidence only, in accordance with Federal Civil Rule 52 (a) as required by Federal Civil Rule 41 (b), as follows:

### FINDINGS OF FACT

I

Plaintiff announced that she did not need and did not ask for further discovery (T., 38).

II

This is an action for legal and equitable relief arising under the Constitution and laws of the United States, and the matter in controversy exceeds the sum or value of $3,000.00, exclusive of interest and costs. As the acts and verbal transactions on which plaintiff bases her original claims occurred in Trenton, New Jersey, the laws of the State of New Jersey have application. This action was instituted on June 29, 1954, by plaintiff against Reconstruction Finance Corporation. On September 3, 1957, when the United States Court of Appeals for the District of Columbia had jurisdiction over this action by virtue of plaintiff's appeal from the judgment of this District Court of March 7, 1957, dismissing plaintiff's amended complaint and action, said Court of Appeals ordered that Robert B. Anderson, Secretary of the

Treasury, be substituted in the place and stead of the Reconstruction Finance Corporation, hereinafter referred to as "Reconstruction."

III

The plaintiff is a resident of the State of New Jersey and the widow of the late Siegfried Roebling, hereinafter mentioned.

IV

The defendant's predecessor, Reconstruction Finance Corporation, was a corporation created by an Act of Congress under date of January 22, 1932, known as the "Reconstruction Finance Corporation Act" (C. 2, Sec. 1, 47 Stat. 5), for the purpose, among others, of making loans to financial institutions organized under the laws of any State or of the United States. Its principal office and place of business was located within the District of Columbia.

V

In 1933, six of the directors of the Trenton Trust Company of Trenton, New Jersey (hereinafter referred to as the Bank), namely: Bruce Bedford, Chris Cartlidge, Richard C Chamberlain, John G. Conner, Harvey G. Voorhees and the above-mentioned Siegfried Roebling, gave their personal notes to the Bank in the aggregate amount of approximately $585,000.00 for the transfer by the Bank to three trustees for said note-maker directors of certain slow assets of the Bank. Siegfried Roebling's personal note originally was in the amount of $200,000.00.

VI

On or about May 23, 1934, the Bank's wholly owned subsidiary corporation, Trentrusco Corporation, hereinafter referred to as "Trentrusco", borrowed from Reconstruction $2,000,000.00 upon Trentrusco's collateral note. The collateral deposited with Reconstruction by Trentrusco consisted of 100,000 shares of the Bank's Preferred Stock A issued to Trentrusco and approximately $500,000.00 of the "slow assets." For such "slow assets" Trentrusco issued to the aforementioned trustees 5,000 shares of the capital stock of Trentrusco. The Bank received from Trentrusco

the $2,000,000.00 the latter borrowed from Reconstruction The Bank on or about the same date issued 20,000 shares of its Preferred Stock B, receiving therefor another $2,000,000.00. Siegfried Roebling purchased from the Bank 18,505 shares of its said Preferred Stock "B" at a price of $100 per share, investing therein $1,850,500.00.

VII

On or about September 18, 1936, Reconstruction purchased directly from the Bank an additional 100,000 shares of the Bank's Preferred Stock A, at a price of $20.00 per share for a total price of $2,000,000.00. Both of the Bank's issues of Preferred Stock A had a par value of $6.00 per share and a retirement value of $20.00 per share, plus accrued dividends.

VIII

Siegfried Roebling died January 1, 1936. He owed then on his aforementioned $200,000.00 personal note to the Bank the sum of $157,429.99. Said note was always recognized and never disputed as a valid obligation by Siegfried Roebling or by the executor of his estate, which was the Bank, named as such by his will. It was always kept in "bankable condition," that is, the interest was kept current and it was fully collateralized. At the time of his death, Mr. Roebling owned a 34.188 per cent participating interest in the assets held by the trustees, consisting of 5,000 shares of Trentrusco stock and the uncollected balance owing on approximately $85,000.00 of the "slow assets." Such 34.188 per cent interest was purchased by plaintiff from her late husband's estate at and for its inventory value of $3,418.80, pursuant to an order of the New Jersey Prerogative Court (having jurisdiction over the probate proceedings of Siegfried Roebling's estate), dated June 22, 1937. T. Girard Wharton, a member of the Bar of the State of New Jersey, as well as a resident of said state, was personal attorney for Siegfried Roebling and plaintiff prior to Mr. Roebling's death, and thereafter Mr. Wharton acted as attorney for plaintiff and the Bank as executor of the will and estate of Mr. Roebling.

IX

Sometime in 1936, one Eugene J. Fountain became Executive Vice President of the Bank and continued in that

position through 1940. From 1936 down to the trial of this action plaintiff has been a stockholder, a director and either Chairman of the Board of Directors or President of the Bank By operation of Siegfried Roebling's will, plaintiff became entitled to 18,505 shares of the 20,000 shares of the Bank's Preferred Stock B and 9,005 shares of the Bank's 28,000 shares of common stock. Early in the administration of the estate, it was discovered by plaintiff, the Bank and T. Girard Wharton, their attorney, that Mr. Roebling's cash, marketable securities and other liquid assets were insufficient to pay debts, inheritance and estate taxes and administration expenses, let alone satisfy the many legacies under his will. When Mr. Roebling died on January 1, 1936, both his 18,505 shares of Preferred Stock B and 9,005 shares of common stock in the Bank were worthless, without book, earnings, dividend or market value. To the task of protecting and restoring this large investment, the Bank as executor, its officers and directors, including decedent's widow, the plaintiff, and T. Girard Wharton devoted their energies from 1936 into 1954. During the administration of Mr. Roebling's estate to June 15, 1954, his substantial investment in the Bank, which was worthless when he died, was restored to a book value of well over $2,000,000.00 with ever improving prospects for earnings, dividend and market value.

X

Commencing in December, 1936, and extending into the latter part of 1939, the Bank endeavored to have all the notes of the six directors, who gave them originally to the Bank in exchange for the slow assets, paid, secured or otherwise placed in bankable condition. As before stated, Mr. Roebling and his Estate always kept his note in bankable condition. Richard C. Chamberlain and his Estate, the Bank being executor thereof, always kept his note in bankable condition. Directors Bedford, Cartlidge, Conner and Voorhees, and later the latter's Estate, objected and failed and refused to recognize their notes as absolute obligations. They took the position that they were liable only if the trusteed assets proved insufficient to pay their notes. Reconstruction, during this period, made several attempts to get the objectors to place their notes in bankable condition by offering to release to all of the six directors as a group (except the

Roebling Estate) shares of the Bank's Preferred Stock A from the Trentrusco collateral of retirement value of $20 00 per share approximately equivalent to the total of the amounts of their notes, namely $367,000.00 upon condition that such Preferred Stock A be posted as collateral for their notes. In December, 1939, the six directors or their estates, as a group, having failed to place their notes in bankable condition, Reconstruction gave notice of its intention to foreclose on the Trentrusco collateral the Trentrusco note being in default. Reconstruction's Board of Directors on December 19, 1939, authorized its Philadelphia branch manager, E. Raymond Scott, to proceed with the foreclosure in order to be in position to deal individually with the note-makers who were willing to recognize their notes and place them in bankable condition. Reconstruction's records showed no indication that any o the Bank's Preferred Stock A was to be released to the plaintiff or to the Roebling estate.

XI

On February 23, 1940, Reconstruction acquired absolute and fee simple title to all of the Trentrusco collateral then held by Reconstruction by purchase at a publicly advertised public sale held on Friday, February 23, 1940, at 10 00 A.M in Room 314, Trenton Trust Company Building, 28 West State Street, Trenton, New Jersey, excepting one item as follows:

| Item | Purchaser | Bid Price |
|---|---|---|
| Peoples Brewing Company 1st 4's of '53 | R.F.C. | $ 51,200.00 |
| Allfather Candy Co. | R.F.C. | 527.52 |
| Allfather Candy Co. | R.F.C. | 1,558.00 |
| Allfather Candy Co. | R.F.C. | 414.48 |
| Ancient Order of Hibernians | R.F.C. | 1,100.00 |
| James Birks | R.F.C. | 3,500.00 |
| Louis Cohen | R.F.C. | 4,537.07 |
| Dickinson & Bradley | R.F.C. | 15,000.00 |
| A. K. Leuckel | R.F.C. | 35,000.00 |
| Estate of W. Hudson Owens | R.F.C. | 4,295.35 |
| St. Mary's Greek Catholic Church | John J. Inglesby & Geo. W. Porzuc | 18,001.00 |

| Item | Purchaser | Bid Price |
|---|---|---|
| Preferred Stock "A" | | |
| Trenton Trust Co. | R.F.C. | $1,671,528.13 |
| | | $1,806,661.55 |

Statement of Loan

| | |
|---|---|
| Principal Balance | $1,704,005.76 |
| Interest to February 22, 1940, inclusive | 102,382.81 |
| Reimbursable Expense | 276.58 |
| | $1,806,665.15 |

The reimbursable expense item of $276.58 is represented by the following foreclosure costs:

| | |
|---|---|
| Rent Room 314 Trenton Trust Building | $ 10.00 |
| Fee, Herman E. Raphael, Auctioneer | 50.00 |
| Advertising in Trenton Times | 199.53 |
| Telephone | 4.55 |
| Transportation | 12.50 |
| | $ 276.58 |

The above-mentioned Preferred Stock A consisted of 100,000 shares thereof, par value $6.00 per share, retirable and payable at $20.00 per share, plus certain dividend rights and cumulative dividends.

XII

On March 15, 1940, Reconstruction's Board of Directors authorized offers of the Bank's Preferred Stock A to Directors Bedford, Cartlidge and Conner and to the Estates of Directors Chamberlain and Voorhees (none being offered to or provided for the Roebling Estate) upon condition that their notes were paid or recognized and placed in bankable condition. This Board authorization was rescinded May 17, 1940.

XIII

Plaintiff, by and through her attorney, T. Girard Wharton, did not make an express oral contract with Reconstruction, by and through its Examiner Verner C. Boggs on or about May 20, 1940, as alleged by Paragraph 12 of plaintiff's Amended Complaint. Reconstruction Examiner Boggs was in Trenton, New Jersey, on an unascertained number of days in May, 1940, prior to May 17, 1940, in connection with

settlement of the disputed directors' notes, and in conferences with plaintiff's Attorney Wharton. Mr. Wharton made no inquiry of any kind to ascertain whether Mr. Boggs had any authority to enter into a contract on behalf of Reconstruction with plaintiff. Plaintiff introduced no proof showing that Mr. Boggs had any authority from Reconstruction's Board of Directors, direct or indirect, to enter into a contract on behalf of Reconstruction with plaintiff. Plaintiff introduced no proof showing that Reconstruction by its Board of Directors or by authority of its Board of Directors by or through any person ever intended to enter into a contract of any kind with plaintiff on or about May 20, 1940. Mr. Wharton assumed that Mr. Boggs had authority to contract for Reconstruction.

XIV

On May 17, 1940, Reconstruction's Board of Directors by board action authorized transfer and assignment of the Bank's Preferred Stock A owned by it as follows: To Bruce Bedford 4,766 shares, to Chris Cartlidge 4,766 shares, to the estate of R. C. Chamberlain, deceased, 2,383 shares and to John G. Conner 1,668 shares, upon condition that prior to assignment and delivery of any of such shares to any such assignee evidence had been received satisfactory to Reconstruction's Philadelphia Agency Manager Scott and Examiner Boggs that the note of the assignee had been paid or placed in bankable condition. Reconstruction's Board action did not mention nor refer to plaintiff or the Roebling Estate. As before stated, it rescinded Reconstruction's Board action of March 15, 1940.

XV

Under date of May 20, 1940, plaintiff's Attorney Wharton wrote Reconstruction, for the attention of Examiner Boggs, a letter that was never acknowledged in writing by Reconstruction by anyone in its behalf. This letter was Mr. Wharton's resume of his view of his conferences with Mr. Boggs. It was not a contract.

XVI

On May 22, 1940, Director Bruce Bedford placed his note to the Bank (which he formerly disputed) in bankable

condition, and Messrs. Scott and Boggs by their letter dated the same day informed the Bank that the conditions set forth in the resolution of Reconstruction's Board of Directors adopted May 17, 1940, had been fulfilled. Reconstruction assigned 4,766 shares of the Bank's Preferred Stock A to Mr. Bedford. He sold it to plaintiff for $6.00 per share, its par value, and applied plaintiff's payment of $28,596.00 on his note to the Bank. Plaintiff actually received said 4,766 shares and held them for years.

On May 23, 1940, Director Chris Cartlidge placed his note to the Bank (which he formerly disputed) in bankable condition, and Messrs. Scott and Boggs by their letter dated the same day informed the Bank that the conditions set forth in the resolution of Reconstruction's Board of Directors adopted May 17, 1940, had been fulfilled. Reconstruction assigned 4,766 shares of the Bank's Preferred Stock A to Mr. Cartlidge. He sold it to plaintiff for $6.00 per share, its par value, and applied plaintiff's payment of $28,596.00 on his note to the Bank. Plaintiff actually received said 4,766 shares and held them for years.

On May 23, 1940, Reconstruction assigned 2,383 shares of the Bank's Preferred Stock A to the estate of R. C. Chamberlain, which kept the stock and did not sell it to plaintiff.

On June 4, 1940, Director John G. Conner placed his note to the Bank (which he formerly disputed) in bankable condition, and Messrs. Scott and Boggs by their letter dated the same day informed the Bank that the conditions set forth in the resolution of Reconstruction's Board of Directors adopted May 17, 1940, had been fulfilled. Reconstruction assigned 1,668 shares of the Bank's Preferred Stock A to Mr. Conner. He sold it to plaintiff for $6.00 per share, its par value, and applied plaintiff's payment of $10,008.00 on his note to the Bank. Plaintiff actually received said 1,668 shares and held them for years.

Plaintiff's $67,200.00 consideration or payment for the abovesaid 11,200 shares of the Bank's Preferred Stock A which she actually received, is the same consideration that plaintiff contended supported her alleged express oral contract.

XVII

T. Girard Wharton's correspondence as plaintiff's attorney to Reconstruction shows only that he recognized that plaintiff had no contract; that he recognized that Reconstruction's Board of Directors had to act favorably in order for plaintiff to have a contract, that he persistently sought a writing signed on behalf of Reconstruction that would constitute a contract; and that he never received such a signed writing.

XVIII

On June 6, 1941, Reconstruction's Board of Directors authorized transfer to plaintiff of 1,200 shares of the Bank's Preferred Stock A, provided that 11 expenses in connection with the assignment to plaintiff of such 1,200 shares were paid by her.

Plaintiff's Attorney Wharton, by his letter of January 24, 1942, to Reconstruction at Philadelphia, transmitted plaintiff's check to the order of Reconstruction for $4.32 in payment for the expense of Federal documentary stamps and plaintiff's signed agreement with Reconstruction, its successors or assigns, dated January 22, 1942, in which plaintiff was designated "Transferee", and agreed that

"1. Transferee will pay all expenses, costs and taxes of every nature, kind or character whatsoever involved in the aforesaid transfer of Stock. Such payment will be made before or after said transfer and is not dependent upon the knowledge of R.F.C. or transferee of the existence of any such expenses, costs or taxes at the time such transfer is made.

"2. Transferee will reimburse R.F.C. for any such expenses, costs or taxes paid by R.F.C.

"3. Transferee acknowledges and agrees that such transfer is made by R.F.C. without representation, warranty or recourse of any nature, kind or character whatsoever.

"4. This Agreement shall be binding upon Transferee, her heirs, executors, administrators, representatives or assigns and shall inure to the benefit of R.F.C. its successors or assigns."

Reconstruction on or about January 31, 1942, released, assigned and transferred to the plaintiff 1,200 shares of the Bank's Preferred Stock A.

XIX

Reconstruction received no benefit or enrichment from plaintiff's purchase of the Bank's Preferred Stock A from Directors Bedford, Cartlidge and Conner. Reconstruction, as the owner of the Bank's Preferred Stock A by foreclosure and by purchase, was entitled to the improvement of the Bank's financial position by payment by said directors of the $67,200.00 they received from plaintiff on their respective notes to the Bank, and as result of the elimination and settlement of the dispute between the Bank and said three directors as to their responsibility upon their notes. Reconstruction received no direct benefit or enrichment from plaintiff or by plaintiff's actions.

At the same time plaintiff as the President of the Bank, a director thereof, and entitled to at least 9,005 shares of its 28,000 shares of common stock and 18,505 shares of its 20,000 shares of Preferred Stock B, was improving the position of the Bank and making a personal investment, which turned out to be highly profitable to her personally. Plaintiff paid $6.00 per share for 11,200 shares of the 199,000 shares of the Bank's Preferred Stock A that then was outstanding, which at the time had a book value of about $12.50 per share although not worth more than $6.00 per share for sale purposes. The Bank's Preferred Stock A held by plaintiff paid her not less than 60¢ per share per annum during all the time she held it, although not always paid on time. Plaintiff liquidated almost all of her 1940 purchase of 11,200 shares of the Bank's Preferred Stock A in 1958 by exchange at the rate or value of $20.00 per share, its callable or retirement value, for common stock of the Bank at the par value and rate of $5.00 per share, resulting in full return of her $67,200.00 investment, and in addition a profit of more than $140,000.00. No action or inducement of Reconstruction caused plaintiff to purchase said 11,200 shares from said three directors. Plaintiff did not lose all or any part of her consideration by any action or inducement of Reconstruction.

On February 7, 1937, the Bank retired 1,000 shares of Reconstruction's September 18, 1936, purchase of the second 100,000 shares of its Preferred Stock A, paying Reconstruction $20,000.00 therefor at $20.00 per share, plus accrued dividends. On June 23, 1947, the Bank retired 10,000 shares of said second 100,000 shares, paying Reconstruction $200,000.00 therefor at $20.00 per share plus accrued dividends. On May 19, 1950, the Bank retired 5,000 shares of said second 100,000 shares, paying Reconstruction $100,000.00 therefor at $20.00 per share, plus accrued dividends. On April 19, 1951, the Bank retired 7,500 shares of said second 100,000 shares, paying Reconstruction $150,000.00 therefor at $20.00 per share, plus accrued dividends. Thus, 23,500 shares of the second issue were retired.

On December 24, 1952, the Bank retired 85,217 shares of the first or Trentrusco May 23, 1934, 100,000 share issue of its Preferred Stock A, paying Reconstruction $1,704,304.00 therefor at $20.00 per share, plus accrued dividends. The other 14,783 shares of said first issue had previously been assigned as hereinabove stated. Thus, the May 23, 1934, 100,000 share issue was completely retired.

On June 26, 1953, the Bank retired 20,000 shares of the second or September 18, 1936, 100,000 share issue, paying Reconstruction $400,000.00 therefor at $20.00 per share, plus accrued dividends, leaving 56,500 shares of the second issue with Reconstruction.

On May 13, 1954, the Bank retired 16,500 shares of said 56,500 shares of the second issue, paying Reconstruction $330,000.00 therefor at $20.00 per share, plus accrued dividends, leaving 40,000 shares of the second issue with Reconstruction.

Also on May 13, 1954, plaintiff personally purchased from Reconstruction the last or remaining 40,000 shares of the second issue, paying Reconstruction $800,000.00 therefor at $20.00 per share, plus accrued dividends of $8,854.80. Plaintiff did so, and completed the transaction, without demanding or requiring of Reconstruction any of said Preferred Stock A as hers of right under her alleged oral agreement of about May 20, 1940, alleged in Paragraph 12 of her Amended Complaint.

Thereafter, within a few days, Mr. Wharton, as attorney for plaintiff, arranged a conference with Reconstruction's General Counsel George E. McConley which was held June 2, 1954. Under date of June 11, 1954, Mr. Wharton, as attorney for plaintiff, wrote Mr. McConley a letter making the claims which are the subject of this civil action.

## CONCLUSIONS OF LAW

1. Plaintiff established no basis for relief upon an express contract, not having proved an express oral contract which she contended had been made by Reconstruction Finance Corporation, defendant's predecessor.

2. Plaintiff established no basis for relief upon a contract implied in fact, not having proved any contractual actions or intention by Reconstruction Finance Corporation, defendant's predecessor.

3. Plaintiff established no basis for relief calling for the Court's imposition of the obligations of a contract implied in law, or quasi contract, upon defendant as successor of Reconstruction Finance Corporation, not having proved

A. That she conferred any benefit upon Reconstruction to which it was not entitled or which cost plaintiff all or any part of her consideration, and

B. That Reconstruction received any unjust enrichment to which it was not entitled or which cost plaintiff all or any part of her consideration, the proof showing only

1. That Reconstruction as owner of Trenton Trust Company Preferred Stock A was justly entitled to any benefit arising from the improvement of Trenton Trust Company's condition, financial and otherwise, and

2. That plaintiff had invested her money in Trenton Trust Company Preferred Stock A which she actually received as intended upon payment of her consideration and on which she received fair income and profit, with the result that plaintiff's consideration was not referrable solely to her dealings with Reconstruction's Examiner Verner C. Boggs and cannot support the imposition of quasi contractual obligations upon the defendant.

A form of order granting defendant's motion to dismiss and dismissing plaintiff's amended complaint, action and claims, and granting defendant judgment against plaintiff for costs incurred by Reconstruction Finance Corporation and by himself in the defense of this action shall be prepared and submitted by defendant's attorney.

Enter: February 11th, 1960.

/s/ F. Dickinson Letts
JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

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No. 15689

MARY G. ROEBLING, Appellant

v.

C. DOUGLAS DILLON, Secretary of the Treasury (substituted for Reconstruction Finance Corporation), Appellee

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Appeal from the United States District Court for the District of Columbia

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Decided February 9, 1961

Mr. John K. Pickens, with whom Messrs. M. Joseph Stoutenburgh and Jerry N. Griffin were on the brief, for appellant.

Mr. H. Clay Espey for appellee.

Before PRETTYMAN, BAZELON and FAHY, Circuit Judges

FAHY, Circuit Judge: The claim of Mary G. Roebling, plaintiff-appellant, to an accounting from the Reconstruction Finance Corporation, [1] based on a contract allegedly entered between the parties, is before us for the second time on

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[1] Robert B. Anderson, as Secretary of the Treasury, was substituted for the RFC as the functions of the latter were transferred to the Secretary. §§ 2(d), (e) and 3, Reorganization Plan No. 1 of 1957, 22 Fed. Reg. 4633 (1957). Subsequently C. Douglas Dillon, who succeeded Robert B. Anderson as Secretary of the Treasury, was substituted as appellee.

appeal. We previously remanded the case on the ground that the limitation imposed on plaintiff by the District Court with respect to matters of discovery was not warranted. 2/

Plaintiff's claim is based on the breach of an express or implied-in-fact contract allegedly entered into between plaintiff's attorney and a representative of the RFC in Trenton, New Jersey sometime in May 1940, or, failing such proof, plaintiff seeks quasi-contractual relief.

Upon the second trial, heard by the court without a jury, RFC's motion to dismiss was granted at the conclusion of plaintiff's case, the court finding that no basis had been established for relief upon an express or an implied contract, and that no basis for finding a quasi-contract had been established. Plaintiff again appeals. We do not consider it necessary to restate the history of the case, which is set out at some length in our previous opinion. Note 2, supra.

Directing our attention first to the contention that RFC has been unjustly enriched, leading to a quasi-contract, plaintiff's evidence fails to show that RFC would not be entitled to any benefit received as a result of the transactions set forth in our previous opinion. Disregarding for the moment the question whether the parties acted pursuant to an agreement, in order for plaintiff to establish unjust enrichment the benefit must be shown to have been unjustly retained. Bailis v. Reconstruction Finance Corp., 128 F.2d 857 (3d Cir. 1942). We do not think plaintiff has shown this. The manner in which she attempted to resolve the dispute which had arisen over the notes is consistent with her natural desire to restore the banking corporation, of which she was a major shareholder, to a sound financial condition. Nor do the facts show that RFC was not entitled to retain any benefit it received.

The District Court concluded that plaintiff had proved no basis for holding RFC to an implied contract. Plaintiff contends that the course of dealings between herself and RFC is consistent only with the conclusion that RFC entered into the alleged agreement. In determining the existence of an implied-in-fact contract, however, the conduct of the

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2/ Roebling v. Anderson, 103 U.S. App. D.C. 237, 257 F.2d 615.

parties is to be viewed as a reasonable man would view it in all the circumstances. St. Paul Fire & Marine Ins. Co. v. Indemnity Ins. Co.; 32 N.J. 17, 158 A.2d 825 (1960); 1 Williston, Contracts § 36 (Jaeger ed. 1957). We are unable to say here that the conduct of the parties clearly enough reveals a promise by RFC to release shares of stock or other assets to plaintiff when conditions permitted as she contends.

This leaves the question whether the negotiations between the parties gave rise to an express oral contract, there being no question that the alleged agreement as such was never reduced to writing by the parties. An express oral agreement is said to have resulted from a series of conferences held in Trenton in May 1940 between plaintiff's attorney and one Boggs, representing the RFC. Although direct evidence is not necessary to establish an express contract, Messenger v. Paterson Savings Inst., 91 N.J.L 654, 103 Atl. 178 (1918), we think the testimony as to these negotiations does not measure up to the burden plaintiff must assume to establish the existence of a definite promise on the part of RFC to obligate itself to plaintiff. We reach the same conclusion with respect to the contention of plaintiff that the conduct of RFC cannot be explained except on the basis of the existence of a contract. While there is some support for this contention, 3/ we cannot say that the District Court should have resolved the doubtful issue in favor of plaintiff. She simply was not able to sustain her burden of establishing an express contract.

We also find no merit in other contentions of plaintiff-appellant, and, accordingly, the judgment of the District Court is

Affirmed.

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3/ The otherwise unexplained release of 1200 shares of preferred A stock to Mary Roebling in 1942, authorized by the RFC in June 1941, lends some support to the contention that an express agreement existed between plaintiff and RFC. And the notation concerning release of stock to plaintiff made by Durr of the RFC on a letter dated April 19, 1940, although the notation may have been made at an earlier stage in the negotiations, is also probative to some degree

## STATUTES AND RULES INVOLVED

Section 603(a) of the Reconstruction Finance Corporation Act (47 Stat. 5, 15 U.S.C. 603) reads, in part, as follows:

"(a) The Corporation shall have succession through June 30, 1956, unless it is sooner dissolved by an Act of Congress. It shall have power to adopt, alter, and use a corporate seal; to make contracts; to lease or purchase such real estate as may be necessary for the transaction of its business; to sue and be sued, to complain and to defend, in any court of competent jurisdiction, State or Federal; to select, employ, and fix the compensation of such officers, employees, attorneys, and agents as shall be necessary for the transaction of the business of the Corporation, in accordance with laws, applicable to the Corporation, as in effect on June 30, 1947, and as thereafter amended; and to prescribe, amend, and repeal, by its board of directors, bylaws, rules, and regulations governing the manner in which its general business may be conducted. Except as may be otherwise provided in this chapter or in the Government Corporation Control Act, the board of directors of the Corporation shall determine the necessity for and the character and amount of its obligations and expenditures under this chapter and the manner in which they shall be incurred, allowed, paid, and accounted for, without regard to the provisions of any other laws governing the expenditure of public funds, and such determinations shall be final and conclusive upon all other officers of the Government. The Corporation shall be entitled to and granted the same immunities and exemptions from the payment of costs, charges, and fees as are granted to the United States pursuant to the provisions of law codified in sections 551, 604, 751, 1913, 1914, and 1923 of Title 28. * * *"

Section 609 of the Reconstruction Finance Corporation Act as amended (67 Stat. 230, 15 U.S.C. 609) reads, in part, as follows:

"If by the close of business on June 30, 1954, its board of directors shall not have completed the liquidation of its assets and the winding up of its affairs, the duty of completing such liquidation and winding up of its affairs shall be transferred to the Secretary of the Treasury, who for such purpose shall succeed to all the powers and duties of the board of directors under this chapter. * * * When the Secretary of the Treasury shall find that such liquidation will no longer be advantageous to the United States and that all of the Corporation's legal obligations have been provided for, he shall retire any capital stock then outstanding, pay into the Treasury as miscellaneous receipts the unused balance of the moneys belonging to the Corporation, and make a final report to the Congress. Thereupon the Corporation shall be deemed to be dissolved."

Federal Rules of Civil Procedure

Rule 41. Dismissal of Actions

"(a) Voluntary Dismissal: Effect Thereof

* * *

"(b) Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. In an action tried by the court without a jury the court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided

in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits. As amended Dec. 27, 1946, effective March 19, 1948.

"(c) Dismissal of Counterclaim, Cross-Claim, or Third-Party Claim.

* * *

"(d) Costs of Previously-Dismissed Action.

* * *

"Rule 52. Findings by the Court

"(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b). As amended Dec. 27, 1946, effective March 19, 1948.

"(b) Amendment. Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new

trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made a motion to amend them or a motion for judgment."

LE COPY

SUPREME COURT, U.S.
FILED
APR 25 1961
JAMES R. BROWNING, Clerk

No. 852

# In the Supreme Court of the United States

OCTOBER TERM, 1960

MARY G. ROEBLING, PETITIONER

*v.*

C. DOUGLAS DILLON, SECRETARY OF THE TREASURY

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

**ARCHIBALD COX,**
*Solicitor General,*
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C. DOUGLAS DILLON, SECRETARY OF THE TREASURY

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

### OPINIONS BELOW

The original judgment of the district court dismissing petitioner's complaint is unreported. The first opinion of the court of appeals (Pet. App. A)[1] is reported at 257 F. 2d 615. The district court's findings of fact and conclusions of law on remand (Pet. App. B) are unreported. The second opinion of the court of appeals (Pet. App. C) is not yet reported.

### JURISDICTION

The judgment of the court of appeals was entered on February 9, 1961. The petition for a writ of cer-

[1] "Pet. App." refers to the appendices attached to the petition.

tiorari was filed on March 27, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether the petitioner failed to sustain her burden of proof to establish either a contract, express or implied, with the Reconstruction Finance Corporation, or quasi-contractual liability.

## STATEMENT

1. The petitioner's husband was a director of the Trenton Trust Company of Trenton, New Jersey (hereafter referred to as the Bank) up to the time of his death on January 1, 1936. In 1933, the petitioner's husband and five other directors entered into an arrangement whereby they gave their personal notes totaling $585,000 to the Bank in exchange for the withdrawal of a like amount of "slow assets" (*i.e.* almost worthless accounts receivable) from the Bank and deposit of those assets with three trustees (Pet. App. 2b, 3b).[2] The purpose of replacing the "slow assets" with these notes was to attempt to restore the Bank's financial integrity impaired by the depression.

In 1934 the Bank (acting through a wholly-owned subsidiary, Trentrusco) obtained a $2,000,000 loan from RFC. In return it gave RFC a note from Trentrusco for $2,000,000, secured by collateral with a face value of 2.5 million, consisting of: (1) 100,000 shares of the Bank's Preferred Stock A (with a liquidation value of $20 per share), and (2) $500,000 worth of the "slow assets" which the Bank had ob-

[2] The note of the petitioner's husband was in the amount of $200,000 (Pet. App. 2b).

tained from the directors' trustees (Pet. App. 2b–3b).[3] In September 1936 the Bank obtained a second $2,000,000 from RFC in exchange for another 100,000 shares of the Bank's Preferred Stock A (with the same liquidation value of $20 per share) (Pet. App. 3b).

Beginning in 1936 the Bank sought to have all of the 1933 personal notes of its directors paid, secured or at least placed in "bankable condition" by the payment of accrued interest plus some of the principal. Two of the six directors, Chamberlain and the petitioner's husband, had kept their notes in bankable condition up to the time of their deaths and the notes were so maintained afterwards by their estates. However, the other four directors objected to the Bank's request on the ground they were not required to pay until such time as the assets held by the trustees should prove insufficient to pay their notes (Pet. App. 4b).

RFC eventually stepped in and made a specific offer to all of the directors or their estates *except petitioner* (Pet. App. 4b–5b), to release shares of the Preferred Stock A (which it held as collateral on the 1934 $2,000,000 loan) to the individual directors in the amount of their respective notes. The offer was conditioned on a return promise that the directors would put their notes in bankable condition and use the shares as collateral. The petitioner was not included because her note was always kept in bankable condition and further, since she was a majority share-

[3] In return for the "slow assets," the Bank gave the trustees 5,000 shares of Trentrusco capital stock.

holder in the Bank, the RFC action would redound to her ultimate benefit (Pet. App. 10b). None of the five directors or their estates accepted the offer. RFC subsequently foreclosed on the Bank's Preferred Stock A and slow assets which it held as collateral, the Bank's note on the first loan then being in default (Pet. App. 5b–6b).

After RFC acquired the stock and assets by foreclosure in 1939, it once again offered each of the directors or their estates *except petitioner* (Pet. App. 6b) Preferred Stock A if they would place their notes in bankable condition. This offer was authorized on March 15, 1940, but subsequently rescinded by RFC on May 17, 1940,[4] when RFC decided to transfer a stated number of shares to these directors on the condition that they submit satisfactory proof that the notes were in bankable condition (Pet. App. 7b). Four of the five directors complied with the condition and received the stock offer.

The petitioner subsequently purchased most of this stock from three of the four directors at $6.00 per share (Pet. App. 8b) and added it to her existing holdings of Preferred A which already totaled approximately $1.85 million in face value (Pet. App. 3b).

2. The petitioner's action is founded on the assertion that her purchase of the stock from the directors constituted complete performance of her part of an alleged oral contract made on May 20, 1940, between her

[4] The March 15 offer was rescinded because RFC decided to add a provision reimbursing the directors for previously assessed costs of foreclosure.

representative and a RFC bank examiner.[5] The details of this alleged contract even as presented in the petition are somewhat obscure. Apparently, the oral understanding allegedly reached with the examiner was that, in return for the petitioner's act of purchasing the stock, she would receive from the government any amount by which the 2.5 million worth of collateral for the first Bank loan should exceed 2 million dollars in actual value. Thus, the petitioner stood to receive at least $500,000 under her alleged contract in return for her act of purchasing $67,200 worth of stock—which she later sold at a $140,000 profit (Pet. App. 10b).

The district court in its original action dismissed the petitioner's complaint for failure to establish such an express oral contract, and failure to establish either an implied contract or a quasi-contractual right. The court of appeals reversed on the ground that the petitioner was entitled to further discovery of certain documents and files (Pet. App. 9a–10a). On remand, the petitioner "announced that she did not need and did not ask for further discovery" (Pet. App. 1b). Instead, she relitigated her original contract allegations. After a full hearing of the petitioner's evidence, the complaint was dismissed once again for failure to establish either an express or implied contract or quasi-contractual right (Pet. App. 12b).

The court of appeals affirmed, holding that: (1) the petitioner failed to sustain her burden of proof in es-

[5] The functions of the RFC were transferred to the Secretary of the Treasury by §§ 2d(e) and 3, Reorganization Plan No. 1 of 1957, 22 Fed. Reg. 4633.

tablishing an express contract (Pet. App. 2c); (2) the conduct of the parties did not "clearly enough" give rise to a finding of an implied contract and (3) the petitioner had failed to demonstrate that RFC had been unjustly enriched by any action of the petitioner (Pet. App. 3c).

## ARGUMENT

The petitioner's cause of action is dependent upon proof of the existence of an express or implied contract or on a right grounded on quasi-contractual principles. Both courts below, on findings of fact by the district court, have now held that the petitioner has not sustained her burden of proving facts essential to sustain her claim on any theory. The concurrent findings of the courts below are conclusive in this Court in the absence of exceptional error. *Corn Products Co.* v. *Commissioner,* 350 U.S. 46, 51; *Comstock* v. *Group of Investors,* 335 U.S. 211, 214. Further review by this Court is, in these circumstances, unwarranted.

1. The petitioner's assertion that the trial court abused its discretion under Rule 41(b), Fed. R. Civ. P., amounts to a reiteration of her convictions concerning the weight and probative effect of the evidence presented to the courts below, but rejected by those courts as insufficient to establish any contractual basis for her claims. The claim that the district court abused its discretion is without merit as is her assertion that the court of appeals misapplied the "clearly erroneous" test of Rule 52(a). Neither of these inherently factual questions warrants this Court's consideration.

2. Moreover, there is no conflict of decisions. The cases upon which the petitioner relies (Pet. 24–30) deal with causes of action and facts wholly unrelated to this case. Manifestly, the sufficiency of proof in a particular case is dependent upon the particular circumstances. Thus, the general discussions contained in the petitioner's cases in no way detract from, or contradict, the specific determinations of the courts below.*

## CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
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WILLIAM H. ORRICK, JR.,
*Assistant Attorney General.*
JOHN G. LAUGHLIN, JR.,
RONALD A. JACKS,
*Attorneys.*

APRIL 1961.

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*Obvious defects in the sufficiency and quality of the petitioner's evidence were: (1) lack of any showing of authority on the part of the bank examiner to enter into or bind the government to the alleged contract (Pet. App. 6b–7b); (2) the absence of any specific unequivocal ratification of such a contract, and (3) the inherently improbable nature of the alleged contract.

U. S. GOVERNMENT PRINTING OFFICE: 1961

No 852

In the

# Supreme Court of the United States

October Term, 1960

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

## BRIEF IN REPLY TO RESPONDENT'S OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

No. 852

In The

# Supreme Court of the United States

October Term, 1960

MARY G. ROEBLING, Petitioner,

v.

C. DOUGLAS DILLON, SECRETARY OF THE TREASURY,
(Substituted for Reconstruction Finance Corporation),
Respondent.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

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## BRIEF IN REPLY TO RESPONDENT'S OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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### REPLY TO RESPONDENT'S STATEMENT

The statement of facts in respondent's brief contains inaccuracies and argumentative conclusions which have no basis in the record evidence or findings of the courts below. For example, respondent emphasizes (Respondent's Brief, pages 3 and 4) that RFC offered to release preferred A stock of the Bank to all directors or their estates except the petitioner. This statement completely ignores the fact that documentary evidence from the RFC files indicated that such stock would be released to petitioner once both RFC loans were paid in full. It also ignores the vital fact that RFC, under official authorization of its board of directors, actually did release 1200 shares of such stock to petitioner. (Pet., page 23)

Respondent states (Brief, page 3) that petitioner was not included in the agreement to release preferred stock A of the Bank to other directors of the bank because her note was always kept in bankable condition and because she was a majority shareholder of the bank. There is not a scintilla of evidence in the record to support this argumentative inference. As a matter of fact, stock was released to the estate of Chamberlain who had always recognized his note and kept it in bankable condition. Nowhere does it appear that petitioner's position as majority stockholder of the Bank was considered in arranging for release of the stock.

Respondent also states (Brief, page 5) that petitioner stood to receive at least $500,000 under her alleged contract in return for her act of purchasing $67,200 worth of stock which she later sold at a profit. Presumably this statement is made to convince the Court that the petitioner received payment for her undertaking under the contract she has alleged. Respondent fails to note that petitioner purchased the stock at a time when there was no market for it and that the assets pledged to secure the RFC loans were "slow assets" which might never be recovered upon. The statement is a continuation of respondent's argument that there can be no consideration for a contract if it is ultimately profitable. Petitioner submits that this is irrelevant and that the argument overlooks the meaning of consideration in the sense of legal detriment.

Respondent's footnote 6 (Brief, page 7) likewise lacks support in the record.

## REPLY TO RESPONDENT'S ARGUMENT

The petitioner respectfully submits that respondent in its brief in opposition to the petition for a writ of certiorari has made no real attempt to answer the arguments and cases as presented and cited by petitioner. Respondent cites only two cases in its brief in support of its argument that this Court should not grant the writ. Both cases are clearly distinguishable and inapplicable to the case at bar.

In Corn Products R. Co. v. Commissioner of Int. Rev., 350 U.S. 46 (1955) reh. den. 350 U.S. 943 (1956), cited by the

respondent, the Supreme Court specifically noted that the petitioner there had made no direct attack on the "two-court findings" below. This Court held at page 50:

> "Both the Tax Court and the Court of Appeals found petitioner's futures transactions to be an integral part of its business designed to protect its manufacturing operations against a price increase in its principal raw material and to assure a ready supply for future manufacturing requirements. Corn Products does not level a direct attack on these two-court findings but insists that its futures were 'property' entitled to capital-asset treatment under § 117 and as such were distinct from its manufacturing business. We cannot agree." (emphasis supplied)

It is further significant that the Supreme Court in the Corn Products case, supra, despite the concurrent findings of the two lower courts nevertheless granted the writ of certiorari, examined the record in that case and made findings which respondent would regard as "inherently factual" before deciding the case. [1]

In Comstock v. Group of Institutional Investors, 335 U.S. 211 (1948), reh. den. 335 U.S. 837 (1948), the only other case cited by respondent, the Supreme Court noted that the petitioner had assumed the correctness of the findings of the District Court but had departed in its argument from such assumptions and invited the Supreme Court to reach different conclusions. [2]

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[1] The opinion states, at page 50:

> "We find nothing in this record to support the contention that Corn Products' futures activity was separate and apart from its manufacturing operation. On the contrary, it appears that the transactions were vitally important to the company's business as a form of insurance against increases in the price of raw corn. . . " (emphasis supplied)

[2] The Court stated at page 213:

> "The issues of fact, contested in a long hearing, are not before us for review. Petitioner assured us, in support of the petition for certiorari here, that 'there is no factual controversy before this Court' and 'we assume the findings of the District Court. Our

(continued on following page)

Petitioner in the instant case does not assume the correctness of the findings of either the District Court or the United States Court of Appeals for the District of Columbia Circuit.

Respondent states (Brief, page 6) that "Both courts below, on findings of fact by the District Court . . . have held against petitioner." It should not be inferred from this that the findings are concurrent in the sense that the Court of Appeals adopted the findings of the District Court. Such is not the case. See Petition, Appendices B and C.

Even aside from these basic distinctions between the foregoing two cases cited by respondent and the present case, it is submitted that they are inapplicable as authorities in opposition to a Petition for Certiorari since the Court granted the writ in both cases.

Petitioner submits that respondent's argument that there is no conflict of decisions is based upon a misreading of the cases and misconception of the nature of the questions presented by the petition. The petitioner has cited contract cases and others in support of her argument. Respondent, however, takes the apparent position that

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2 (Continued from preceding page)

challenge is directed only to the legal import of these unchallenged facts.' "

Assuming arguendo, that the findings of both courts in the present case were "concurrent", it is submitted that exceptional error has been shown in the present case, as the findings against petitioner were made despite the fact that positive and controlling documentary and testimonial evidence supported her claims and was neither impeached nor contradicted.

It is further noted that in the Comstock case, supra, the Court of Appeals for the 8th Circuit (as well as the Supreme Court) had found (163 F.2d 350, 357) that:

> "On this appeal the case is stated for the appellant in substantial disregard of the findings of the trial court and practically as though the case was here to be tried by this court de novo on the voluminous evidence. This court must decline to assume that function." (emphasis supplied)

Petitioner has not so erred. The Court of Appeals did not so find, nor does the respondent charge that the petitioner's arguments have disregarded the findings.

petitioner must cite cases involving identical facts and causes of action. It is petitioner's position that a trial judge in a District Court, sitting without a jury in a civil action, has certain duties under Rules 41(b) and 52 of the Federal Rules of Civil Procedure which remain constant. This duty does not vary from case to case. Similarly, the supervisory functions and responsibilities of the Circuit Courts of Appeals remain constant, in case after case.

The petitioner reiterates that there is a real and serious conflict between the decision of the Court of Appeals in the instant case and the decisions of this Court in Chesapeake & Ohio Ry. Co. v. Martin, 283 U.S. 209, 215-22, 51 S.Ct. 453 (1931), and in Pence v. U. S., 316 U.S. 332, 62 S.Ct. 1080 (1942); as well as the decisions in Twentieth Century-Fox Film Corp. v. Dieckhaus, 153 F.2d 893, cert. den. 329 U.S. 716, 67 S.Ct. 46 (1946) and other cases cited in the petition.

If respondent's argument on this point were valid, then the determination of the vital questions of procedure and the administration of justice involved in this and similar cases might never be made by this Court. In this event, the petitioner, and future plaintiffs whose cases may be dismissed before the presentation of any defense evidence, on the basis of records containing uncontradicted evidence supporting such plaintiffs' claims will be left without either a remedy for judicial error or so much as a guideline for future litigation.

The respondent also attempts to persuade this Court to dismiss the present petition by an assertion, unsupported by the citation of a single case, that abuse of discretion of a judge of a United States District Court or misapplication of the "clearly erroneous" test of Rule 52(a) of the Federal Rules of Civil Procedure by a United States Court of Appeals are "inherently factual questions" not warranting consideration by this Court.

Such a position would preclude the Supreme Court from ever clarifying what constitutes an abuse of discretion or a disregard of the "clearly erroneous" rule, and it would prevent this Court from correcting exceptional error such as exists in the present case. The result would be to vest in the lower courts the absolute and untrammeled authority to dismiss cases in complete disregard of sound judicial discretion and the rights of a plaintiff.

## CONCLUSION

For the foregoing reasons, and those set forth in the petition herein, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Of Counsel

Harry Heher

May 4, 1961